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Supreme Court, U.S.
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No. ① OFFICE OF THE CLERK
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IN THE

SUPREME COURT OF THE UNITED STATES

BHUPENDRA K SHAH- PETITIONER

vs.

HELEN HAYES HOSPITAL, AND NYS DEPARTMENT OF HEALTH - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions presented to the Court

Did the 2nd Circuit err when, in conflict with the principles of stare decisis, it applied its own idea- such as the petitioner was using his or her opposition to a dispositive motion as a means to amend the complaint - as a basis to deny the petitioner's constitutional rights or claims within the context of 28 U.S.C. 636(b)(1) ?

Did the 2nd Circuit err when, in conflict with decisions of the several Circuit including its own Circuit, it blindly held under 28 U.S.C. § 636(b)(1) that it would not perform de novo review where a district judge has stated that it has considered a party's objections to a magistrate judge's R & R, even though the district judge made a "clear error" and made a "misstatement" about its own conclusion?

LIST OF PARTIES

There are no parties to the proceedings other than those listed in the captioned.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-6a) is reported at 2007 U.S. App. Lexis 25323.The denial of petition for rehearing is not reported but is attached as App. 49a. The Order of the District judge granting summary judgment in favor of respondents is attached as App.7a-8a. And the Report and Recommendation of the magistrate judge is also attached herewith as App. 8a - 48a.

JURISDICTION

The United States Court of Appeals for the Second Circuit has decided the case on October 29, 2007 in favor of respondents. A timely petition for rehearing was denied on December 12, 2007. Hon. Justice Ginsberg granted the application for extension of time to file the petition for Writ of Certiorari by on or before May 10, 2008. The petition was submitted on April 29, 2008, but it was returned for non compliance with the filing requirement of Rule 33.1. By letter dated May 7, 2008, the clerk informed that the petition is not in a booklet form and that the corrected petition should be resubmitted within 60 days from the date of his letter.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

1. The Rule 28 U.S.C. 636(b)(1) provides: ."Within ten days after being served with a copy, any party may serve and file objections to the proposed findings and recommendations as provided rules of court. A judge of the court shall make a de novo determination of those portion of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings of the recommendations made by the magistrate judge."

STATEMENT OF THE CASE

I. Overview

The petitioner ("Petitioner") was employed by the respondents as "Research Sc. II (Biostatistics)" on a full time and permanent basis from 1986 until he was coerced to participate in the Early Retirement Incentive ("ERI") plan or face a lay off next year. Petitioner had no choice but accept the ERI offer against his will and under duress. Petitioner, *pro se,* filed a second amended complaint ("complaint") of continual discrimination and/or retaliation, and hostile work environment against his national origin and color under Title VII, the Civil Rights Acts of 1866, 1871 and 1991, § 40-c of the New York Civil Rights Law ("NYCRL") and violation of his constitutional rights under the 1st, 5th, And 14th Amendment to the Constitution of the United States.

II. Facts reported by the magistrate judge:

In her Report and recommendation ("R & R") (at App. 13a - 23a), the magistrate judge blindly followed those facts submitted by respondents' attorney and omitted facts submitted by the *pro se* petitioner. As a result, she reported some facts and omitted some facts including those related to deprivation of Petitioner's constitutional rights. Although, some of the facts were "wholly accurate and/or complete," but some were not so. For instance, the ERI event was incomplete and inaccurate because the magistrate judge failed to adjudicate Petitioner's request on January 26, 2003 to withdraw his name from the ERI list.

III. Facts omitted by the magistrate judge.

In the following paragraphs, the petitioner respectfully presents those facts or evidences that were omitted by the magistrate judge.

(A) Omission of evidences of constitutional rights.

(A.1) Due Process Clause: On or about November 19, 2002, respondent circulated a "Retirement incentive survey form" ("Survey") to all employees. After reading the "Survey," Petitioner determined that the "Survey" form is a non binding form and not a "Notice" to abolish his permanent position. So he signed it and returned it the next day for efficient administration of the business which he was doing for years. However, treating the "Survey" form as "a signed notice of interest," respondents assumed that they have satisfied the "due process" requirement for abolishing his position. Board of Regents v. Roth 408 U.S. 564; Jones v. Flowers, 547 U.S. 220 (2006). Even though Petitioner did not sign any binding documents authorizing the employer to abolish his permanent position, it did so on December 30, 2002 without his knowledge. On January 26, 2003, Petitioner learned from Mr. Czachorowski ("Czachorowski") that they have recommended to abolish his position because he signed the "Survey" form. Petitioner immediately responded that he does not wish to participate in the ERI program. Even though, the petitioner has stated that he was not interested in participating in the ERI program, Czachorowski didn't withdraw his name from the list he faxed to Albany on January 28, 2003.

(A.2) Equal protection clause: Even though the Helen Hayes Hospital ("HHH") had sufficient[1] power to promote any research scientist including Petitioner, the HHH asked Petitioner to submit an application on a

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[1] The February 14, 1989 memo from the Department of Civil Service ("DCS") requires to establish an "ad hoc panel consisting of selected top level senior research scientists and administrations representing appropriate specialized fields." Instead of selecting

CC-2E to the Department of Civil Service ("DCS ") for a promotion. In sharp contrast, HHH promoted Dr. Jeri Nieves (W) within two years from her initial appointment without having her to file application on CC-2E form to the DCS and without appointment of ad hoc panel. On the other hand, respondent treated petitioner differently when he asked for a promotion. Note that Petitioner was never promoted from his initial appointment in 1984.

(A.3) Equal protection clause: The petitioner submitted evidence supporting that Dr. David Dempster, who was a foreigner at the time of hiring, was given freedom to work in his specialty of Bone Hestomorphmetry. The evidence supported that Bone Hestomorphmetry is not among specialty approved by the DCS. In a similar sittuation, even though petitioner's specialty designation of "Biostatistics" was an approved specialty, he was not allowed to work in his specialty of "Biostatistics." Instead, he was ordered or forced to work in "systems development for a comprehensive management information network " and was transferred from one

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top level scientists, they appointed a nurse and violated the procdure of establishment of Research Scientist position.

department to another. The HHH indeed treated him differently in terms of work assignments.

(A.4) Equal protection Clause: The magistrate judge failed to consider that the petitioner was treated differently in compensation for a similar work in the same title. For instance, Czachorowski has conceded that petitioner was working as "Associate Computer Programmer Analyst, Gr. 23" from at least 1997. In his brief opposing respondents' motion for a summary judgment, Petitioner explained that respondents misled EEOC by stating that the petitioner salary of $57,916 was above the average salary of $54,327 paid by Hudsson on Valley Hospital Industry Group to a computer programer/analyst. The reason being that the average salary of $54,327 was not based on 40 hr/wk but was based on 35 hr/wk. If one adjusts the hour factor, it comes to out to be $58, 724.90 and not $54,327.00 as claimed. In addition, the Magistrate judge failed to compare the compensation paid to employees with similar titles. For instance, the petitioner was working as an "Associate Computer Programmer Analyst" which title is equivalent to a title of "Assistant MIS director" in the Industry group. The average annual compensation for the position of "Assistant MIS director" was $78,828.06, whereas Petitioner was paid only $57,916. Thus, Petitioner was indeed treated differently in terms of compensation for the similar title or work.

(A.5) Equal protection clause: Petitioner submitted the evidence supporting that Mr. Ennis ("Ennis") had grungingly conceded that respondent converted a hallway without a door as an office space for Petitioner. In a similar situation, when foreign white scientists were hired, they were provided red carpet service (such as 14' x 14' office space with a lock, wall to wall carpet, equipment etc.). Thus, the employer treated the American minority Petitioner differently than white foreigners.

(A.6) Equal protection clause (with respect to training): The July 12, 2005 memo from Ennis supports that he sent all (except Petitioner) professional staff of MIS (including a white temporary employee who had no protection of Civil Service law) and several other employees excluding employees of Indian national origin to Boston for Meditech training. In a similar situation, no such training opportunity was provided to Petitioner.

(B) Omission of facts other than the constitutional rights.

(B.1) The January 30, 1986 memorandum supports that the respondent transferred Petitioner from Research Department to Administration Department, directed him to work on Information technology and report directly to the Deputy Director of HHH. The Petitioner obeyed the directives and worked very hard in his new assignment. As a result of his success, the New York State Department of Health ("DOH") awarded him Commissioner's Recognition Award "for developing software that helped to increase productivity by providing accurate and timely statistical information to Helen Hayes Hospital mangers and staff" in 1993.

During 1991, HHH gave a contract to Superior Consulting Company to process medical data. The company placed Mr. Ennis in charge of Electronic Data Processing unit. [Mr. Ennis was placed under the supervision of Mr. Froman who was reporting to the Deputy Director of HHH.][2].

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[2] The information in the square bracket was not communicated (or made available) to the magistrate judge.

(B.2) On or about November 14, 1997, respondents again transferred Petitioner to MIS Department from Administration Department and ordered him to work directly under the supervision of a private contractor. Actually, his transfer to the MIS in1997 was a demotion Even though Petitioner complained about deprivation of his 5th, 13th and 14th Amendment to respondents, he was forced to obey the orders of his supervisor. For example, in his memorandum dated November 26, 1997, the Deputy Director stated "You have been given a direct order to report to Mr. Ennis and Mr. Buhowski and not complying is not acceptable." [This memorandum was not presented to the magistrate judge]. For fear of losing his job, Petitioner obeyed the order of his superior.

(B.3) The DCS denied petitioner's application for a promotion. He appealed that decision to Civil Service Commission ("CSC"). During the public hearing on December 17, 2001, the commissioners were extremely impressed with what Petitioner did and is doing for the people of the State of New York. The mood of the three commissioners was in favor of granting the promotion at least to Grade 25 level. But at the last minute, the respondent voluntarily presented the report of the Ad Hoc committee. By voluntarily submitting the Ad hoc committee's report to CSC, the employer broke its own promise dated March 12th 2001 and retaliated against Petitioner for a filing a federal complaint (00 CIV 8873 (CM)). As a result, the Commission ruled in their favor.

(B.4) Petitioner's qualifications for the position of CIO:

Concerning Petitioner's qualifications for the position of CIO, the Magistrate judge omitted the following facts: Czchorowski knowingly applied double standard. For instance, Czachorowski stated in his affidavit dated January 10, 2006 that "Plaintiff, whose specialty is statistics, did not have the requisite management and other qualification for this position." For the following reasons, he misled the Court: (1)The position of CIO was listed in Occupational Code 0820410 of the DCS which has a different set of criteria for hiring than that of the scientific series. But he applied qualification standard set forth in scientific series, such as petitioner's education in statistics, as a means to justify that Petitioner had no management and other qualification for the position of CIO. Conversely, he did not apply the same standard (i.e., college education) when HHH appointed Ennis, who had B.A. degree in health care management with no formal education in computer science, to the position of CIO. (2) During August/ September 2001, respondents advertised several positions in news papers. They stated that "... is seeking experienced **Information Management Professionals** to work with its new Meditech information system .... ." Even though Ennis had no experience in Meditech system as of September 1, 2001 and was an outsider, they convince the Civil Service people and hired him on a permanent basis. In sharp contrast, even though Petitioner was working as "Associate Computer Programmer Analyst," which is a title one step below the title of CIO, at least from 1997, and he had acquired knowledge in the new Meditech system (as per memo dated October 4, 2001), the respondents didn't promote him to the position of CIO. (3) As to the issue of management experience, Petitioner was in charge of supervising one professional computer programmer and two or three key punch operators in 1983 at DOH. However, after his transfer to HHH in 1984, he was assign to perform the duties of computer science from

1986 until he was transferred to the HR department in 2002, and(4) The respondent HHH never provided any opportunity to manage a department or to supervise any personal because of Plaintiff's race and national origin. So Czachorowski's claim that Petitioner had no management experience for the position of CIO has no merit.

In his brief opposing respondents' motion for summary judgment, Petitioner stated that pursuant to the Uniform Guideline 14C(1) and 14C(4), 43 Federal Register 38, 302 (1978), the respondents did not produce any list of both knowledge -based and abilities-based elements constituting supervisory experience. In his affidavit and Rule 56.1 statement, Petitioner has presented full account why he is qualified for the position of CIO. Here, even though there was a genuine dispute about the qualifications for the position of CIO, the magistrate judge blindly ignored it.

(B.5) Disparate Impact claim: In complaint ¶ (16.2) Petitioner had identified two unlawful practices that caused discrimination in the work place. He provided statistical data and statistical analysis to support prima facie evidence of discrimination under the adverse impact model. Pursuant to section 3(o)(1) of the Civil Rights Act of 1991, respondents are required to show that a particular employment practice bears a significant relationship to the performance of the job at issue. Here, respondents didn't offer any evidence such as statistical reports, validation studies, expert testimony, prior successful experience as permitted by the Federal Rule of Evidence in support of a claim of business necessity for the position of CIO. Given that the respondents didn't make any argument about business necessity under the Civil Rights Act of 1991 before the Magistrate judge, Petitioner had in fact establish disparate impact claim for the position of CIO. But the Magistrate judge, who blindly following those submitted by respondents, didn't adjudicate the disparate impact claim.

(B.6) Other evidence of prejudice against Indian nationals:

The following evidence was omitted by the Magstrate judge: The HHH advertised four positions in the hope that white qualified computer scientists would apply. [But only four persons including three Indian Scientists applied][2]. In his hand written note, Czachorowski marked "No Singh's resume to 09/30/01" and "several Indians in." So instead of hiring two Indians and one white from a pool of four applicants, it hired all the three white employees of Superior Consulting Co.

(B.7) Omission of Facts of false statements. In his affidavit with Rule 56.1 statements, Petitioner had submitted evidences supporting that Czachorowski et al knowingly made false statements in their affidavits. For instance, in his reply affidavit, Czachorowski claimed that Petitioner made repeated requests for transfer. Your honor, in his letter dated March 14, 2006 to the Magistrate judge, Petitioner presented evidences supporting that he didn't make such requests as claimed by Czachorowski. The Magistrate Judge not only omitted the important evidence but also failed to adjudicate the issues of credibility of witnesses and to comprehend the existence of genuine issue of facts.

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[2] This data was not communicated to the Magistrate Judge.

IV District Court Proceedings:

The case was assigned to a magistrate judge. The respondents moved for a summary judgment. And the Magistrate Judge issued a report and recommendation ("R & R") recommending that the respondents' motion be granted. Petitioner filed fourteen timely objections to the R & R. In his Order, the district judge concluded (i) that the New York Civil Rights Law claim is properly dismissed and (ii) that "the Title VII claims are both untimely and barred by failure to exhaust." He then concluded that "This court finds no legal infirmity in the Report and Recommendation of the learned Magistrate Judge, which is hereby adopted as the decision of this Court."

V. Court of Appeals Proceedings:

On or about June 1, 2006, Petitioner filed a timely notice of appeal. In his letter to the Court, Mr. Silbert stated that he is the attorney for respondents. The Court issued a scheduling order dated January 10, 2007 requiring respondents to file their brief by March 12, 2007. However, on March 2, 2007, another attorney Mr. David Lawrence filed a motion for extension of time to file their brief by April 11, 2007. By letters dated April 23, 2007 and April 30, 2007 to the Court of Appeals, Petitioner explained that it shouldn't grant extension of time because Mr. Lawrence has failed to meet the provision of Rule 26(b) of Fed. R. App. Procedure. But the Court granted their motion. During the oral argument on October 22, 2007 , Petitioner argued that pursuant to court's Civil Appeal Management Plan ("CAMP"), the respondents' motion for enlargement of time was time barred and humbly stated to enforce the court's procedure. But the panel took no action. In response to Petitioner's letter dated December 23, 2007 , the clerk of the Court stated: "The Civil Appeal Management Plan ("CAMP") does not apply to pro se appeals." Your honor, the Court of Appeals applied CAMP rules differently for different groups of litigants (such as *pro se*).

In its Summary Order, the court of Appeals concluded that the district court didn't err (i) in concluding 'no legal infirmity' in the entire R & R; (ii) in denying petitioner's constitutional rights ; (iii) because affidavits that were made in bad faith and (iv) because

Petitioner failed to come forward with evidence to support prima facie cases of discrimination, retaliation or a hostile work environment. His timely petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

(A) Need to invoke judicial discretion of the Court.

In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of the fact and law, necessary to perform of that supreme function. Crowell v. Benson. 285 U.S. 22 (1932). The Supreme Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake. Gonzales v. Carhart, 2007 U.S. Lexis 4338.

Here, in his complaint, Petitioner pleaded some factual allegations of deprivation of his constitutional rights and gave the defendants a fair notice of what the constitutional claims were and the grounds upon which they rest. Although the factual allegations were not listed under a specific heading, they were sufficient enough to raise a right to relief above the speculative level. See 5 C. Wright & A Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004). See also Bell Atl. Corp., v. Twombly, 550 U.S. _____ (2007).

Speculating that Petitioner was using his opposition to amend his complaint, the Court of Appeals applied its precedent and stated that at a party may not use his or her opposition to a dispositive motion as means to amend the complaint Wright v. Ernst & Young, 152 F.3d 169, 178 (2d Cir. 1998). Here, in his second amended complaint ("Complaint"), Petitioner did plead his constitutional rights. He also pleaded those rights in his brief[3] opposing respondents' motion for summary judgment, in his objections to R & R and in his brief to Court of Appeals. In addition, arguments not made before a magistrate judge are normally waived. Divane v. Krull Electric Co., 194 F. 3d 845, 849 (7th Cir. 1999) Here, respondents didn't defend Petitioner's constitutional rights which were pleaded before the magistrate judge who has acknowledged that "Defendants subjected him to unequal treatment in violation of his 14th Amendment rights (see page 36a). But in R & R, she failed to adjudicate those claims. Unfortunately, the Article III judges followed what was in the R & R and abandoned to conduct de novo reviews of all the objections. This prima facie evidence supports that the district judge's conclusion of "no legal infirmity in R & R" lacks merit.

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[3] Some the constitutional rights were discovered during the discovery procedure.

Therefore, this court has a constitutional duty to review factual findings where the petitioner's constitutional rights were abandoned by the Article III judge. Gonzales v. Carhart (Supra). And the failure of the appellate judges to adjudicate constitutional rights constitutes "clear error." United States v. Garcia, 413 F. 3d 201, 22 (2d Cir. 2005). It should be reversed.

(B). In the interest of Judicial Economy: During the fiscal year from 04/01/07 through 03/31/08, United States District Courts across the nation have referred about 42, 337 federal cases to magistrate judges under the magistrate act. About 17,748 cases out of 42,337 were referred to the district judges for further adjudication under 28 U.S.C. § 636(b)(1). Several circuits have interpreted the meaning of "de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made" as "de novo review of R & R," or "de novo review of objections filed by a party," or "de novo review of the record with respect to that fact- ual issue," or "adopting of the R & R of a magistrate judge" or "de novo review under clearly erroneous standard" etc. For instance, here, the Court of Appeals for the Second Circuit had interpreted that it will not make de novo review where a district judge has stated that it has considered a party's objection to the magistrate judge's R & R (App. 1a-7a). If one applies this precedent blindly, then the "clear error" committed by the Article III judge would never be corrected under the Second Circuit's precedent. Therefore, both in the interest of justice and judicial economy, this Court should consider providing a clear and uniform standard for "adopting or not adopting" R & R of a magistrate judge especially where a party's constitutional rights are at stake.

(C). Controversies among Several Circuits.

Several circuits have different interpretation of the meaning of "adopting the R & R of a magistrate judge" Because the magistrate is an impartial judicial officer, it is easier to justify adopting the R & R than to justify adopting findings of fact and conclusion of law. Where the district judge abdicates to the magistrate, the appellate judges must supply the necessary de novo review. United States v. Herbst, 641 F.2d 1161, 1167 (5th Cir. 1981), United States v. McKennon, 814 F. 2d. 1539, 1543 n. 6 (11th Cir. 1987). In Anderson v. Bessemer City, 470 U.S. 564, 571-73 (1985), the Court stated that when trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if "clearly erroneous." However, the Anderson court didn't discuss the standard of appellate review (i) where a magistrate judge blindly adopts those submitted by a party represented by an attorney and excludes facts (including those related to constitutional claims) submitted by a *pro se* party and (ii) where the appellate court under their precedent adopts the district judge's findings without reviewing the records or objections to

R & R. Before Anderson a number of circuits have declined to defer to judicial findings culled from the parties submissions. In United States v. Hardin, 710 F. 2d 1231, 1235-36 (7th Cir. 1983), the court stated that standard of appellate review does not depend on whether a district court adopted the magistrate's report or wrote a new opinion, but it should depend on findings of fact that we review only for clear error. See United States v. D'Antoni, 856 F.2d 975, 978-79 (7th Cir. 1988); United States v. Hawkins, 823 F. 2d 1020, 1022 (7th Cir. 1987); United States v. Marin, 761 F. 2d 426, 433 (7th cir. 1985); Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 933-35 (7th Cir. 1989) (en Banc). United States v. Rodriguez, 888 F. 2d 519 (7th Cir. 1989) Walton v. United Consumers Club Inc., 786 F. 2d 303, 313-14 (7th Cir. 1986). In Picard v . Thompson, 170 Fed Appx. 86, 2006 U.S. App. Lexis 5370, the court stated: "Whenever any party filed objections, the district court has an obligation to conduct a de novo review of the record with respect to that factual issue." Stokes v. Singletary, 952 F.2d 1567, 1576 (11th Cir. 1992) (Quoting Loconte v. Dugger, 847 F. 2d 745, 750 (11th Cir. 1988). But the Picard Court didn't explicitly stated that the panel of circuit judges has the same obligation as that of the district judges within the context of 28 U.S.C. §636(b)(1).

When objections are made to the magistrate's factual findings based on conflicting Testimony or evidence, both 28 U.S.C.S. § 636(b)(1) and U.S. Const. Art. III require de novo review. And the district court must clearly indicate that it is conducting a de novo determination rather than review under the clearly erroneous standard. Gee. v. Estes et al. 829 F.2d 1005 (10th Cir. 1987). Joseph Brenner Assoc., Inc. v. Starmaker Entm't, Inc. 82 F.3d 55 (2d Cir. 1996).

The Court of Appeals for the Second Circuit held that it will not reverse the district court's order in which a district court has stated that it has considered a party's objections to a magistrate judge's R & R. See Murphy v. Int'l Machs. Corp., 23 F. 3d 719, 722 (2d Cir. 1994), Cert. denied (on other grounds), 513 U.S. 876 (1994), See also Shah v. Helen Hayes Hospital et al 2007 U.S. App. Lexis 25323. However it is not clear that Murphy's precedent is still applicable where evidences support that a district judge didn't not properly review the objections.

In the 8th circuit, it is well established that in the absence of any evidence to the contrary, the panel of circuit judges will presume that the review of magistrate judge's R & R by a district judge was properly done. United States v. Hamell, 931 F. 2d 466, 468 (8th Cir. 1991), Cert. denied, 502 U.S. 928, 116 L.Ed. 2d 286, 112 S. Ct. 347 (1991). In Longmire v. Guste, 921 F.2d 620, 623 (5th Cir. 1991), the 5th Circuit held that it would not reverse the judgment of the district court if the district court performs its review function properly in the absence of evidence to the contrary. In Hosna v. Groose, 80 F.3d 298 (8th Cir. 1996) (citing 28 U.S.C. § 636(b)(1). Cert. Denied, 519 U.S. 860, 136 L. Ed. 2d 107, 117 S. Ct. 164 (1996)), the Eight Circuit presumed that the district court has made a de novo review, however, unless affirmative evidence demonstrates otherwise. In Holt v. Crist, 233 Fed. Appx. 900 (11th Cir. 2007), the Eleventh Circuit court stated that the district court is required to make de nova review of both the R & R and the objections.

Here, Petitioner filed fourteen objections to R & R of the Magistrate judge. And the record (App. 8a) supports that the district judge reviewed only the first of the fourteen objections that was related to the issue of consent of parties under 28 U.S.C. § 636(c). Without specifying the order of the objection, the panel has conceded that the district judge reviewed only one objection (App. 1a-7a). This finding supports that the district judge did not review 92.85% of the objections to the R & R and didn't perform its review function properly. But, the Court of Appeals for the Second Circuit failed to respect both the provision of 28 U.S.C. S. 636(b)(1) and U.S. Const. Art. III and failed to reverse the judgment on the merit. Longmire v. Guste, (Supra).

(D). District court erred for failing to perform de novo determination in presence of conflicting testimony.

When objections are made to the magistrate's factual finding based on conflicting testimony or evidence, the district court must clearly indicate that it is conducting a de novo determination rather than review under the "clearly erroneous" standard. Aluminum Co. of America v. United States Environmental Protection Agency, 663 F.2d 499, 502 (4th Cir.1981).

Here, the district court erred in failing to review the petitioner's constitutional rights (sectionIII (A)). More specifically, concerning violation of due process clause of the 5th and 14th Amendments, there were conflicting evidences about "Retirement Incentive Interest Survey" and "signed notice of interest form" (Czachowroski's Affidavit at ¶23). Concerning "Equal protection Clause" violation, there were conflicting evidences about the "Voluntariness of ERI" program, promotion to the position of Res. Sc. IV, Gr. 27 without making an application on CC-2E form and without appointment of "Ad hoc" panel as they did with Dr. Jeri Nieve's promotion etc.

Concerning other relevant matters, there were conflicting evidences about the qualifications of the position of CIO (Rule 56.1 statement, Czachorowski's Affidavit (¶ 17)) and the September 5, 2002 transfer requests. The following paragraphs provides conflicting evidences about September 5th 2002 transfer:

(D.1) When it became clear that the petitioner had established a prima facie case of transfer, Czachorowski in his reply affidavit stated without providing concrete details that the petitioner suggested and asked for a transfer from MIS Department. It is not sufficient merely to assert a conclusion without supplying supporting arguments of facts. Bellsouth Telecomms. , Inc. v. W. R. Grace & Co. 77 F.3d 603, 615 (2d Cir. 1978). The eight E-mails dated July 16, 2002 support that the request of transfer and its justification came from Mr. Ennis and not from Petitioner as claimed by Czachorwoski. Here, in his reply affidavit Czachorowksi knowingly misled the Court.

Assume that Czachorowski's claim of repeated transfer including the September 5, 2002 was true. But then it would imply that the employer repeatedly denied those transfer requests except for the September 5th, 2002 request. Under 42 USCS §2000e-5(e)(1), each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice. National Railroad Passenger Corporation v. Morgan, 536 U.S.

101 (2002). Therefore, by denying repeated requests for transfer, the respondent discriminated/retaliated time and continually violated the provision of Title VII.

(D. 2) Even though the petitioner wrote a letter on March 14, 2006 about genuine issue of fact relating to his transfer on September 5, 2002 and the perjured statements made by Ms. Ramirez and Czachorowski, the magistrate judge failed to adjudicate those issues. For instance, at # 23 of her Interrogatory, Ms Ramirez stated under an oath that the transfer was made at the plaintiff's request. However, her E-mail dated July 16, 2002 at 2.07 P.M. stated that "I don't know what to do w/him given that MIS can't use him. What do you think?" It is clear from her interrogatory and her E-mail dated July 16, 2002 that Ms Ramirez knowingly made contradictory statements under oath justifying an increase for obstruction of justice. United States v. Dunnigan 507 U.S. 87 (1993).

(D. 3) In her R & R (at App. 39a), the magistrate judge interpreted "September 5th 2002 transfer cause of action" as a failure to "promote cause of action." In his objection #12, the petitioner provided evidences supporting that his September 5, 2002 transfer to MIS was an adverse employment action within the meaning of 42 U.S.C. § 2000e - 2(a) and not a failure to promote cause of action as adjudicated. In his brief opposing respondents' motion for Summary Judgment, Petitioner provided evidences supporting that his transfer was vulnerable to layoff and with a significant diminished responsibilities causing him a severe professional trauma, humiliation and loss of social contacts with managers with whom he has worked for eighteen years. In Terry v. Ashcroft, 336 F. 3d 128, 138 (2d Cir. 2003), significantly diminished material responsibility has been characterized as an "adverse employment action" within the context of 42 U.S.C. § 2000e-2(a). However, here, it was more than a significant diminished material responsibilities because by transferring Petitioner's to HR Department, they made his job vulnerable to a layoff causing significant change in benefits. Burlington Industries, Inc. v. Ellerth, 524 U. S. 742, 761 (1998). Therefore, the magistrate judge erred when she failed to recognize (1) that petitioner's transfer with significant diminished responsibilities was in fact an "adverse employment action" within the context of 42 U.S.C. § 2000e-2(a) and (2) that the affidavits were made in bad faith justifying an increase for obstruction of justice United States v. Dunnigan (Supra).

(D.4) Concerning the qualifications for the position of CIO, Petitioner provided analysis that he is qualified for the position of CIO. However, Czacharowski stated in his affidavit that he is not. Both the magistrate judge and the district judge failed to comprehend that Czacharowski is a Director of Human Resources and a lay person. His opinion, whether offered as a lay witness pursuant to Fed. R. Evid. 701, or by an expert pursuant to Fed. R. Evid. 702, is not admissible simply "because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704. In addition, Czachorowski argued that position of CIO requires "supervisory experience" or "management experience." But he failed to produce any list of both the knowledge-based and ability-based elements constituting supervisory or management experience. (Guideline 14C(4) Uniform Guidelines 14C(1), 43 Fed. Reg. 38, 302 (1978)).

The above evidences support that there was a conflicting testimony about the qualifications of position of CIO and that the affidavit was not made in good faith. Since it affects Petitioner's "substantial right," the district court made an error. It should be reversed. Fed. R. Evid. 103(a).

(E) Abuse of Power by the District Judge within the context of 28 U.S.C. § 636(b)(1).

Due to word limitation, the following sections describe some instances of abuse of power in adopting the R & R.

(E.1) "Clearly erroneous" conclusion.

The district judge found that petitioner's Title VII claims are time barred and failure to exhaust. Since the magistrate judge, the respondents and Petitioner had independently ascertained that certain Title VII claims are in fact both timely and had been properly exhausted (App. 41a -070a), the judge's finding of fact is not only "clearly erroneous" in the context of Anderson v. Bessemer City (supra) but also a "misstatement" of underlying facts by the Article III judge. (Emphasis added).

(E.2) Misstatement that there is no legal infirmity in the R & R.

In his Order dated May 19, 2006, the district judge concluded that there is no legal infirmity in the R & R of the magistrate judge. The following paragraphs present some evidences contradicting his conclusion of no legal infirmity in the R & R:

(a) Misstatement of "Voluntariness" of ERI program:

Citing Auerbach v. Board of Education of the Harborfields Central School Dist., 136 F.3d 104, 113 (2d Cir. 1998), the magistrate judge concluded that ERI program was voluntary. To determine voluntariness of a retirement plan, the Second Circuit stated, "a court must consider whether, under the circumstances, a reasonable person would have concluded that there was no choice but to accept the offer." The court then stated that fraud, threats of imminent layoffs, intimidation or subtle coercion are elements of non-voluntariness.

(a.1) Here, Czachorowski conceded in his affidavit that: "A purpose of ERI was to avoid the possibility of layoffs, " (App. 22a). Since threats of imminent layoffs and coercion are elements of non-voluntariness, it is clear from Czachorowski's admission that the ERI program was not voluntary for Petitioner. Auerbach (supra). Therefore, the magistrate judge's conclusion that ERI program was voluntary is not supported by the evidence.

(a.2) In addition, the following incident of coercion and intimidation give rise the circumstances in which Petitioner had no choice but to accept the offer:

On November 20, 2002, Petitioner signed and returned a "retirement incentive interest survey" form which does not give rise to a level of "a notice requirement" for abolishing Petitioner's tenured position. On December 30, 2002, Ms. Ramirez sent the list of targeted employees to Albany and abolished their positions including that of Petitioner's without affording him any opportunity to present his objections. Board of Regents v. Roth (Supra); Jones. V.Flowers. (Supra). On

January 26, 2003, Petitioner learned from Czachorowski that the employer has targeted his position for the ERI program. Petitioner was very upset and immediately stated that he was not interested in participating in the ERI. Instead of withdrawing his name from the list[4], Czachorowski threatened him with a layoff constituting "adverse employment action" within the meaning of Burlington v. White, 2006 U.S. Lexis 4895, 126 S. Ct. 2405; 165 L.Ed. 2d 345.

After the threat and coercion on January 26, 2003, Petitioner wrote a memorandum dated February 26, 2003 to Ms. Ramirez requesting her to provide clear directives so that he can make ERI decision based on facts and not hearsay opinion. But she never replied. Pursuant to Section 219(1) of the Restatement (See Burlington Industries, Inc. v. Ellerth (Supra)), the respondent NYS Department of Health ("DOH") may be liable for both the negligent and intentional torts committed by Ms. Ramirez within the scope of her employment with DOH . Petitioner realized that the real intent of the employer was to get rid off him and that he had no choice but to participate in ERI under a threat of a layoff. So he decided to get out now rather than face a layoff later.

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[4] In a similar situation, HHH withdrew Carolyn Wilson's name and deprived Petitioner equal protection clause of the 14th Amendment to the constitution.

Therefore, the ERI program was not voluntary for Petitioner as he was subjected to a threat of a layoff or subtle coercion on and after January 26, 2003.

(a.3) The following evidence supports that Magistrate Judge's claim that petitioner knowingly and freely participated in the ERI is false.

Here, the whole period of November 20,2002 (i.e., from the date of signing non binding survey form) through the date of retirement on March 29, 2003 was not at all free from "obvious form of coercion." The reason being that the petitioner learned for the first time on January 26, 2003 that HHH had recommended to abolish his position under the ERI program. On that day, Czachorowski threatened Petitioner with a layoff next year if he does not participate in the ERI program. Since Petitioner was threatened on January 26, '03 , the period from January 26, 2003 through March 29, 2003 was not free from coercion.

It is obvious from the above chronology that the first 67 days from November 20, 2002 through January 25, 2003 were free from coercion. But, the remaining 33 days were not free from coercion. Even though the magistrate judge has conceded that Petitioner was threatened with a lay off, she misled the judge by stating that Petitioner freely chose to participate in the ERI program. Therefore, the magistrate judge erred when she concluded that Petitioner knowingly and freely participated in the ERI program.

(b) Misinterpretation of cause of action:

In her R & R (App. 058a), the magistrate judge erred when she misinterpreted the "September 5th 2002 transfer cause of action" as a failure to "promote cause of action," and misapplied the Brown v. Coach Stores, Inc. 163 F.3d 706, 709 (2d Cir. 1998) to the facts. For instance, she stated: "However, Plaintiff fails to allege that he applied for a specific supervisory position." It should be noted that the complaint ¶ 18 was referring to "supervisory responsibility" and not "supervisory position" or "a specific position" as interpreted by the Magistrate judge.

It is obvious that the district judge didn't read the magistrate judge's misinterpretation of September 5th 2002 transfer cause of action" as a failure to "promote cause of action."

Therefore, the above instances support that district judge's conclusion of no legal infirmity in the R & R is without merit.

(F) Improper use of power by the panel of the Court of Appeals for the Second circuit

(F.1) Regarding "clear error" analysis, Petitioner clearly stated at pages 3-5 of his brief dated February 5, 2007 to the Court of Appeals that the district judge made a misstatement about timeliness of properly exhausted Title VII claims. Therefore, the panel had full knowledge of the fact that the district judge has made a "clear error" about timeliness of properly exhausted Title VII claims. But, instead of finding that the district judge made a material misstatement of the fact, the panel erred by concluding that they would not conduct *de* *novo* review where a district court has stated that it has considered a party's objections to a magistrate judge's R & R.

(F.2) Regarding lack of credibility of affidavits of Czachorwoski et al, the panel stated that "there is no indication that the Magistrate Judge failed to give Shah's evidence in support of his claims due consideration." Here, the moving party for a summary judgment has a difficult burden of demonstrating "the absence of a genuine issue of material fact" and his entitlement to judgment as a matter of law. Fed. Rul. Civ. Proc. 56; Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Beard v. Banks, 548 U.S. 521 (2006). Here, in his Rule 56.1 statement and other filings, the petitioner stated that affidavits were made in bad faith and that he is qualified for the position of CIO. In his March 14, 2006 letter to the Magistrate judge, Petitioner explained that Czacchorowski's reply affidavit contained no concrete particulars . There were about two thousand pages of discovery material in the custody of both parties. But respondents didn't submit a single page supporting their claim that Petitioner made repeated requests for transfer. It is not sufficient to merely to assert a conclusion without supplying supporting arguments or facts. See

Bellsouth Telecomms., Inc. v. W. R. Grace & Co. (Supra). However, in their letter dated March 24, 2006 to the magistrate judge, the respondents argued that Czachorowski's reply affidavit referring to repeated transfer is supported by the plaintiff's history of complaints to EEOC and NYS Division of Human Rights and that the plaintiff's memorandum of March 6, 2002 refers to his concern about highly stressful working environment and his request that Ms. Ramirez take "remedial action." Your honor, the March 6, 2002 memorandum clearly supports that the phrase "remedial action " was related to prevention of catastrophic illness and bears no relation to his request for transfer. The reason being that in his memo dated April 17, 2002, Czachorowski correctly interpreted the meaning of "remedial action" as a "health issue" and not as a "request for transfer" or "repeated request for transfer." Therefore, the respondents have failed to convince the jury that there was no genuine issue of material fact about the request of September 5, 2002 transfer. As a result they are not entitled to judgment as a matter of law.

Assume that the respondents have demonstrated no genuine issue of material fact. But if a nonmoving party demonstrates existence of a genuine issue fact, then the moving party is not entitled to judgment as a matter of law (Rule 56(e) of Fed. R. Civ. P.). Here, subsections (D.1), (D.2) and (D.3) provide complete details supporting that the Magistrate Judge didn't give due consideration to Petitioner's March 14th, 2006 letter to the (pertaining to September 5th, 2002 transfer) Magistrate Judge. In his March 14th letter, Petitioner demonstrated (i) that the request for transfer came from Mr. Ennis and not from Petitioner as claimed and (ii) that both Czachorowski & Ms.Ramirez have knowingly made a false statement under the oath. He did set forth specific facts showing that there was a genuine issue of material fact to be tried as required. See Bryant v. Maffuci, 923 F.2d 979, 982 (2d Cir.) Cert. denied, 502 U.S. 849 (1991). In addition, the Magistrate Judge (App. 058a - 60a) failed to give due consideration of Petitioner's discrimination claim of September 5th,2002 transfer which was presented in his letter dated March14th,2006. Therefore, the panel abused its power when it concluded that there is no indication that magistrate judge failed to give due consideration to Shah's evidence in support of his claims.

(F.3) Concerning lack of credibility to affidavits, the panel claimed that a party cannot defeat the motion by relying on the allegations in his pleadings, or conclusory statements, or on mere assertions that affidavits supporting the motion are not credible. For the reasons set forth below, the panel's conclusion has no merit:

(F.3.1) Here, the paragraph (F.2) supports that Petitioner did provide facts supporting that affidavits were not credible. However, 28 U.S.C.S. § 636(b)(1) does not require an objecting party to spell out its concerns in any detail. By contrast, for example, Fed. Rules of Appellate Procedure 28(a)(9)(A) requires appellate briefs to contain appellate contentions and reasons for them with citations to the authorities and parts of the record on which the appellant relies. United States v. Brandon Charles 476 F.3d 492 (7th Cir. 2007).

Here, the petitioner did set forth details of fourteen objections (including his concerns about the affidavits). Again, he did explain the details of perjury in his appellate brief as required under the appellate rule. Citing United States v. Rosa, 11 F. 3d 315, 329 (2d cir. 1993), Cert denied, 511 U.S. 1096, 114 S. Ct. 1864 , 128 L.Ed. 2d 485 (1994), the court held that determination of credibility of witnesses is the "province of the district court." United States v. Tortora, 30 F. 3d 334 (2d Cir. 1994). In United States v. Garcia, 413 F.3d 201, 22 (2d Cir. 2005), the court stated that "We review the underlying factual findings for clear error. The term clear error review mandates that we defer to the district courts factual findings, particularly those involving credibility determinations." So, pursuant to its own precedent in Garcia (Supra), the panel should have remanded the case to the district court for credibility determination. But it didn't. Therefore, it erred for failing to respect its precedent and to remand the case.

(F.3.2) In one instance, appellees have conceded in their appellate brief at page 11 that the petitioner has submitted a form and not an application for ERI. In point (D) or (F.2), Petitioner has demonstrated that he did not rely on mere allegation or conclusory statements to defeat the motion for summary judgment. It was magistrate judge's fault who blindly followed those submitted by respondents and failed to read petitioner's submissions.

(F.4) The panel erred when it failed in its duty to conduct de novo determination of the following additional evidences that were presented during the oral argument:

During the oral argument on October 22, 2007, Petitioner did provide additional evidences relating to "continuing discrimination" and false statement made by Czachorowksi in his reply affidavit in which he asserted that petitioner made repeated requests of transfer from MIS. Concerning "existence of an ongoing policy of discrimination" as alleged in ¶ 14 of the complaint, Petitioner presented evidences supporting that he was was not the only victim of discrimination against his national origin but Ms. Padma Nair, who was a Nurse from India, was also denied promotion in 2006 even though she had more years of experience and more education than the selected nurse Ms. Patti LeGeayt (W). See Pearson v. Board of Educ. 499 F. Supp. 2d 574 (2007) and Remigion v. Kelly, 2005 WL 1950138. But the panel of judges erred when it failed in its duty to conduct de novo determination of the additional evidences as required.

(F.5) In any judicial or administrative proceedings, deliberate falsehoods "well may affect the dearest concerns of the parties before a tribunal [.]" United

States v. Norris 300 U.S. 564, 574 (1937). Here, there were substantial evidences that affidavits were made in bad faith. Some of them are as follows:

(F.5.1) Subsection (F.3.2) supports that respondents have conceded that Petitioner had submitted a form and not an application for ERI as claimed.

(F.5.2) During the oral argument on October 22, 2007, the petitioner explained that Czachorowski's sworn statement about repeated transfer in ¶ 5 of his reply affidavit was misleading.

(F.5.3) In her E-mails dated 16, 2006, Ms. Ramirez acknowledged that the request for transfer came from Mr. Ennis. But, she contradicted the content of her E-mail when she stated under the oath: "I am aware that plaintiff transfer from MIS was, in part, a response to his request." Therefore, affidavits were made in bad faith and admission of party's dishonesty (referring to "survey" form, which was not a "notice") about material fact is an affirmative evidence of guilt. Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133 (2000)

In Reeves (Supra), the court stated:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive . . . Thus, a plaintiff's prima facie case combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Here, in ¶ (16.2) of his complaint, Petitioner had established a prima facie case at least under a disparate impact model. In their motion for summary judgment, respondents remained silent about the prima facie case under the disparate impact model. So they waived their right to defend the disparate impact claim. Concerning qualifications for the position of CIO, the following evidence supports that Czachorowski misled the court. The contract for Superior consulting was expiring on September 1 2001. The respondents wanted to replace the staff of Superior consulting company (Ennis, Fitzsimmons and Serao) with people experienced in Medi Tech System. In the advertisement, respondents clearly that they were seeking experienced Information Management Professionals to work with the new meditech System. As of September 1, 2001, Ennis had no experience in Meditech System. In contrast, Petitioner had acquired knowledge of Meditech's NPR Module, which is a part of Meditech system. Even though, the petitioner had knowledge in Meditech system, he was not hired as CIO. In order to hire Mr. Ennis, Czachorowski in his affidavits had set forth criteria that fits the questionable qualifications of Mr. Ennis and not the duties of the CIO position. (See Rule 56.1 Statement). For instance, the requirement of seven to ten years of management experience has nothing to do managing Meditech system. The fact that HHH lost about $200,000 after installation of Meditech system speaks for itself. In addition, the Meditech system was not able process of clinical and financial data in 2005. As a result HHH lost valuable patients' clinical and financial data. If a candidate had adequate knowledge of operating the Meditech system, he would not make such mistakes twice. In ¶ 17 of his affidavit, Czachorowski stated that "Plaintiff, whose specialty is statistics, did not have the requisite management and other qualifications for this position." Your honor, page 11 of Section (B.4) supports that he misled the court.

Therefore, the foregoing total evidence combined with prima facie evidence of discrimination at least under the disparate impact model demonstrates that the respondent unlawfully discriminated the petitioner. Reeves (supra).

(F.6) The panel argued that the petitioner failed to identify facts in evidence before the District Court from which a reasonable jury would conclude that he has established a prima facie case for any of these claims.

When objections to a R & R are made, the statute 28U.S.C. §636(b)(1) requires appellate judges to review the record. The statute 28 U.S.C. §636(b)(1) does not require an objecting party to spell out its concerns in any detail. And the Federal Rule of Appellate Procedure c28(a)(9)(A) requires appellate briefs to contain an appellant's contentions and the reasons for them. United States of America v. Branden H Charles (Supra). Here, in ¶ (6) of his objections to the R & R, Petitioner identified facts of prima facie case under the disparate impact model. Again, in ¶ (9.2) (a) and ¶ (9.2) (c) of his objections to the R & R, Petitioner identified prima facie evidences of discrimination for the position of CIO. At pages 19 - 26 of his appellate brief, he also identified prima facie evidences of discrimination in promotion to the position of "Res. Sc. IV, Grade 27" and in promotion to a vacant position of Robert Close. Your honor, Petitioner is not at fault, but the panel didn't review the available prima facie evidences submitted to the district court.

Therefore, the panel erred when it stated that Petitioner didn't identify facts in evidence before the District Court

CONCLUSION

The petition for writ certiorari should be granted with cost.

Respectfully Submitted,

Bhupendra K. Shah
Bhupendra K Shah
845-623-6158.

Date: June , 2008

P.S. Due to words limitations, Petitioner regrets to mention that he was not able to explain due process violation in great detail.

APPENDIX

06-4068-cv
Shah v. Helen Hayes Hospital

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's local rule32.1 and federal rule of appellate procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the federal appendix or be accompanied by the notation: (Summary Order). A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in the electronic database which is publicly accessible without payment of fee (such as the database available at HTTP://www.CA2.USCOURTS.GOV) If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in hich the order was entered.

At a stated term of the United States court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the city of New of York on the 29th day of October, two thousand seven.

PRESENT:

HON. WILFRED FEINBERG,
HON. RALPH K. WINTER,
HON. CHESTER J STRAUB,
Circuit Judges.

Bhupendra K Shah,
Plaintiff-Appellant,

-v- 06-4068-cv

Helen Hayes Hospital, NY
Department of Health,
Defendants-Appellees.

FOR APPELLANT: Bhupendra K Shah, Pearl River, NY
FOR APPELLEES: Andrew M. Cuomo, Attorney General of the State of New York, Gregory Silbert, Assistant Solicitor General, New York, New York.

AFTER ARGUMENT AND UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the district court judgment is AFFIRMED.

Plaintiff-Appellant Bhupendra K Shah, *pro se*, appeals from the May 19, 2006, judgment of the United States District Court for the Southern District of New York (Brieant, Judge) granting defendants-appellees' motion for summary judgment. Shah asserts claims of unlawful racial discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§§ 1981 and 1983, as well as section 40-c of the N.Y. Civil Rights Law. We assume the parties familiar with the underlying facts and procedural history of the case.

We review an order granting summary judgment *de novo* and ask whether the District court properly concluded that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Miller v. Wolpoff & Abramson*, 321 F.3d 292, 300(2d Cir. 2003). Cert. denied, 540 U.S. 823 (2003). In determining whether there are genuine issues of material fact, we are "required to resolve all ambiguities and draw all permissible inferences in favor of the party against whom summary judgment is sought." *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir.20- 03) (internal quotation marks omitted). We will affirm the dismissal of a claim on summary judgment only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entit- le [him] to relief." *Id.*(Internal quotation marks omitted).

On appeal, Shah argues that the District Court failed to conduct *de novo* review of the Magistrate Judge's Report and Recommendation ("R&R"), as required under 28 U.S. C. § 636(b)(1), prior to granting summary judgment. Specifically, Shah contends that the District Court read and considered only one of his fourteen objections to the R&R. While it is true that the District Court focused on one of Shah's objections to the R&R, the District Court acknowledged that Shah had made several others and concluded that there was "no legal infirmity" in the entire R&R. Where a district Court has stated that it has considered a party's objections to a magistrate judge's R&R, we have rejected the argument that the mere brevity of the district court's order granting summary judgment based upon that Report and Recommendation demonstrates the absence of a *de nova* review. See *Murhy v. Int' Bus. Machs. Corp*. 23 F. 3d 719, 722 (2d cir. 1994), *cert. denied*, 513 U.S. 876 (1994). Other than his conclusory allegations, Shah has identified no evidence that the District Court failed to consider his objections to the R & R. Therefore, we will not reverse the District Court on this ground.

Shah also claims that the District Court erred in granting summary judgment because the defendants-appellees had offered affidavits in support of their motion that were made in "bad faith." By "bad faith," Shah appears to argue that the affidavits of three Helen Hayes Hospital employees- Director, Magdalena Ramirez, Director of Human Resources Walter Czachorowski, and Chief of Information Services Virgil Ennis- contained specific errors of misstatements. However, Shah also concedes that he brought these alleged errors to the attention of the Magistrate Judge in opposing the motion for summary judgment. While Shah believes that the Magistrate Judge did not read his submissions and "blindly followed" those submitted by defendants-appellees, there is no indication that the Magistrate Judge failed to give Shah's evidence in support of his claims due consideration. To the extent that Shah is arguing that the District Court's erred in granting summary judgment because affidavits lack credibility, we have held that a party "cannot defeat the motion by relying on the allegations in his pleading, or conclusory statements, or on mere assertion that affidavits supporting the motion are not credible." *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996) (citation and internal quotations marks omitted).

Shah also raised claims under 5th and 14th Amendments. However, Shah asserted these claims only in his motion papers in response to defendant-appellees' motion for summary judgment. A party may not use his or her opposition to a dispositive motion as a means to amend the complaint. See *Wright v. Ernst & Young*

LLP, 152 F.3d 169, 178 (2d Cir. 1998) (collecting cases). The District court did not err in granting summary judgment on Shah's constitutional claims.

Finally, Shah simply argues that the District Court erred in "adjudicating [his] discrimination, retaliation and claims under Title VII." The District Court, in adopting the Magistrate Judge's R&R, granted summary judgment to the defendants-appellees on several grounds, including the untimeliness of Shah's claims, lack of exhaustion of administrative remedies, and Shah's failure to come forward with evidence to support prima facie cases of discrimination, retaliation or a hostile work environment. On appeal, Shah fails to identify facts in evidence before the District Court from which a reasonable jury could conclude that Shah had established a *prima facie* case for any of these claims. See *Kessler v. Westchester County Dep't of Soc. Servs.*, 461 F.3d 199, 205-05 (2d cir. 2006) (explaining *prima facie* of retaliation under Title VII); *Petrosino v. Bell Atlantic*, 385 F.3d 210, 221,226 (2d Cir. 2004) (explaining prima facie cases of failure- to- promote discrimination and hostile work environment under Title VII). Therefore, summary judgment was proper on these claims.

Having reviewed the District Court's decision and the Magistrate Judge's R&R, we find no legal infirmity in the order granting summary judgment to the defendants-appellees in its entirety. For the foregoing reasons, we AFFIRM the judgment of the district court.

FOR THE COURT:
Catherine O'Hogan Wolfe, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
BHUPENDRA K SHAH,
Plaintiff

- against -

04 Civ. 7342(CLB)
(LMS)
Memorandum and
Order

HELEN HAYES HOSPITAL AND
N.Y.S. DEPARTMENT OF HEALTH,
Defendant.
---X

Brieant J.

Before this court for consideration is a Report and rt and Recmmendation of the Honorable Lisa Margaret Smith, United States Magistrate Judge, filed April 11 2006 and Objections thereto by Dr. Shah filed May 17, 2006. The familiarity of the reader therewith is assumed.

The Magistrate Judge recommended that Defendants' motion for Summary Judgment should be granted and the Second Amended Complaint filed January 10, 2005(Doc. 8) should be dismissed in its entirety.

The Magistrate Judge concluded as a of matter law that the New York State agencies sued therein were protected by the Eleventh Amendment and are also not "persons" within the meaning of § 1983. The New York Civil Rights Law claim is properly dismissed for failure to serve the New York State Attorney General and the Title VII claims are both untimely and barred by failure to exhaust.

The principal Objection is that the Magistrate Judge could not proceed without the consent of the parties obtained under 28 U.S.C. § 636(c). There is no basis for this contention. The Magistrate Judge was directed to and did hear and report, with respect to the motion, a function that does not require consent.

This Court finds no legal infirmity in the Report and Recommendation of the learned Magistrate Judge, which is hereby adopted as the decision of this Court. Defendants' motion for summary judgment is granted. The Clerk of the Court shall file a final judgment.

SO ORDERED

Dated: White Plains, New York
May 19, 2006

Charles L. Brieant U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
BHUPENDRA K SHAH,
Plaintiff

04 Civ. 7342(CLB)
(LMS)

- against -

REPORT AND RECOMMENDATION

HELEN HAYES HOSPITAL AND
N.Y.S. DEPARTMENT OF HEALTH,
Defendant.
---X

TO: THE HONORABLE CHARLES L. BRIEANT, U.S. DISTRICT JUDGE

Pro se Plaintiff Bhupendra Shah ("Plaintiff") brings this civil rights action under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Civil Rights Acts of 1866, 1871 and 1991, and § 40-c of the New York Civil Rights Law ("NYCRL").[1] Plaintiff claims that his former employer, N.Y. State Department of Health ("DOH"), and

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[1] Plaintiff's claim originally included a pendent state law claim for breach of contract, which he voluntarily withdrew in a conference before the Undersigned on October 12, 2005.

Helen Hayes Hospital ("Helen Hayes") (collectively, the "Defendants"), subjected him to a hostile working environment, discriminated against him based on his race and national origin, and retaliated against him. Plaintiff further claims that the defendants violated his constitutional rights under the First, Fifth and Fourteenth Amendments.

The Defendants move for summary judgment dismissing Plaintiff's claims in their entirety. First, the Defendants argue that Plaintiff's § 1983 claims are barred because the Defendants, as state agencies, are immune from suit under the Eleventh Amendment.[2] Second, the Defendants argue that many of Plaintiff's claims under Title VII must be dismissed as they are either untimely or have not been administratively exhausted. Third, with respect to Plaintiff's Title VII claims that are timely and properly exhausted, the Defendants argue that these claims are without merit, and should be dismissed. Alternatively, the Defendants argue that even if the Court were to find that Plaintiff established a prima facie case of employment discrimination with respect to his timely claims, that the Defendants have articulated legitimate, nondiscriminatory reasons for their actions, and that Plaintiff cannot sustain his burden of proving by a preponderance of the evidence that these reasons were pretextual.

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[2] In their reply Memorandum of Law in Further Support of the Defendants' Motion for Summary Judgment ("Defendants' Reply"), the Defendants further argue that Plaintiff's § 1981 claims are barred because the Supreme court has held that § 1983 provides the exclusive remedy for violation of § 1981 by state actors. See Defendants' Reply at 2-3 (citing Jett v. Dallas Independent School District, 491 U.S. 701, 731 (1989); see also infra at 18.

For the reasons stated below, I conclude, and respectfully recommend that Your honor should conclude, that Defendants' motion for Summary Judgment should be granted in it entirety.

I. BACKGROUND

A. Relevant Facts [3]

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[3] The following facts are taken from: (1) the Second Amended Complaint; (2) the Defendants' Motion for Summary judgment and the Defendants' Statement Pursuant to Local Rule 56.1 ("Defendants' 56.1 Statement"); (3) the Plaintiff's Memorandum of Law in opposition to the Defendants' Motion for Summary Judgment ("Plaintiff's Opposition") and the Plaintiff's Statement under Rule 56.1 ("Plaintiff's 56.1 Statement"); (4) the Defendants' Reply; and (5) the evidence submitted by the parties in support of (Footnote three continues on next page)

Plaintiff is an Asian male of Indian national origin who immigrated to the United States from India and is a naturalized citizen of the United States. Second Amended Complaint (hereinafter "Complaint") at ¶ 1. Plaintiff is skilled in the area of computer programming and statistical analysis, and holds a doctorate degree in statistics from Yale University, as well as a doctorate degree from the M.S. University of Baroda, India. Complaint at ¶ 10. In 1983, Plaintiff became employed by the DOH at the Albany location, where he was classified as a Research Scientist 2, Grade 22, in the field of Biostatistics. [4] See Complaint at ¶ 10. In 1984,

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their submissions, including deposition testimony and affidavits. The facts contained in this section are largely uncontested, and are construed in the light most favorable to Plaintiff, the non-moving party.

[4] The parties disagrees on the date that Plaintiff was designated as a Research Scientist 2, Salary Grade 22. The Defendants assert that Plaintiff's designation as a Research Scientist 2, Grade 22, became effective June 5, 1986. See Defendants' 56.1 Statement at ¶ 2. However, Plaintiff insists that he became "permanently employed" as a Research Scientist 2, Grade 22 on September 22, 1983. See Plaintiff's Affidavit in Support of his Opposition to Defendants' Motion for Summary Judgment ("Plaintiff. Aff.") at Exhibit 68; Plaintiff 56.1 Statement at ¶ 2. Both parties agree that the Defendant's employment ended on March 28, 2003. See

(Footnote four continues on next page)

Plaintiff was transferred to Helen Hayes, located in West Haverstraw, New York, where he continued to be classified as a Research Scientist 2, Grade 22. Id. At Helen Hayes, Plaintiff was assigned to positions where he could utilize his knowledge of computers and statistics. Complaint at ¶ 10. Specifically, Plaintiff was familiar with the Saint System of computer software used at Helen Hayes, and worked on numerous reports and projects using the Saint System. Supporting Affidavit of Virgil Ennis ("Ennis. Aff.") at ¶ 6.

In August, 2000, a meeting was held at Helen Hayes, the purpose of which was to discuss Plaintiff's desire for a promotion and reclassification from his position as Research Scientist 2, Grade 22 to Research Scientist 4, Grade 27. Complaint at ¶ 15; Defendants' 56.1 Statement at ¶ 27. Magdalena Ramirez, the Director of Helen Hayes ("Ms. Ramirez"); Walter Czachorowski, the Director fo Human Resources at Helen Hayes ("Czachorowski"), New York Assemblyman Alexander Gromack, and Plaintiff, were present at the meeting along other legislators and representatives

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Defendants' 56.1 Statement at ¶ 2; Plaintiff's 56.1 Statement at ¶ 2 . Because Plaintiff is a the non-moving party, I construe the facts in favor of Plaintiff. In any event, I note that resolution of this factual dispute has no bearing on my analysis of the Defendants' Motion in this Report and Recommendation.

of Helen Hayes. Complaint at ¶ 15; Defendants' 56.1 Statement at ¶ 27. At the meeting, Plaintiff was directed to make an application for the grade promotion with the Department of Civil Service ("DCS"). Complaint at ¶ 15. Plaintiff filed such an application with DCS on January 8, 2001 (hereinafter "Plaintiff's Application"). Id. On June 26, 2001, DCS denied Plaintiff's Application, finding that Plaintiff's responsibilities were not consistent with the duties of a Research Scientist 4, who "typically serve as full members of a research team with major responsibilities for all phases of a research project." Defendants' 56.1 Statement at ¶ 29; Plaintiff's 56.1 Statement at ¶ 29. Plaintiff's duties in his position were found to be more consistent with the duties of an Associate Computer Analyst, which is classified as a Grade 23. Id. Plaintiff whose position was classified as a Grade 22, was advised against accepting a promotion to be reclassified as a Grade 23 because he would lose the longevity bonus he was receiving at his current grade level.[5] Id.

On August 3, 2001, Plaintiff appealed the June 26, 2001, decision to the New York State Civil Service Commission (the "Commission"). Defendants' 56.1

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[5] According to Czachorowski, reclassifying Plaintiff's position as a Grade 23 would have resulted in a net loss of pay to Plaintiff. See Czachorowski. Aff. at ¶ 9, n.3.

Statement at ¶ 30; Plaintiff's 56.1 Statement at ¶ 31. On September 12, 2001, and "Ad Hoc Committee" of research scientists at Helen Hayes met and unanimously determined that Plaintiff's job description was "not consistent with that of a Research Scientist [4]." Defendants' 56.1 Statement at ¶ 33; Plaintiff's 56.1 Statement at ¶ 33. The findings of the Ad Hoc Committee were then submitted at a public hearing held by the Commission on December 17, 2001, at which Plaintiff was heard. Complaint at ¶ 15. On February 1, 2002, Plaintiff was notified that his appeal was denied. Defendants' 56.1 Statement at ¶ 35; Plaintiff's 56.1 Statement at ¶ 35.

In 1997, Helen Hayes had reorganized all of its computer staff into one Management Information Services Department ("MIS"). Complaint at ¶ 11. A private company called Superior Consultants, Inc. ("Superior"), oversaw the reorganization, and Virgil Ennis ("Ennis"), an employee of Superior, was the project Director for MIS. Ennis. Aff. at ¶ 2. On April 1, 2002, Ennis was hired by DOH as a permanent employee and was appointed to the position of Chief of Information Services at Helen Hayes. Ennis.Aff. at ¶¶ 1 and 2; Complaint at ¶16. In the winter of 2002, there was an opening in MIS for a Computer Clinical Coordinator. Complaint at ¶ 17.

Shortly thereafter, Donna Damon ("Damon"), a nurse employed by the DOH and working at Helen Hayes, was transferred to MIS to fill this position. Complaint ¶ 17.

Plaintiff was assigned to work in MIS from 1997 through September, 2002, during which time Ennis was Plaintiff's direct supervisor. Complaint at ¶ 11; Ennis. Aff. at ¶ 3. Ennis wrote positive reviews of Plaintiff's work performance during the time that he supervised Plaintiff in MIS. Supporting Affidavit of Walter Czachorowski ("Czachorowski.Aff.") at ¶ 31 and annexed Exhibits H, I and J; Ennis.Aff. at ¶ 14. Moreover, through out his employment at Helen Hayes, Plaintiff received positive evaluations. Czachorowski .Aff. at ¶ 31; Rosenzweig.Af. Exhibit C at ¶ 2.

Plaintiff, prior to being assigned to MIS, set his own schedule and was able to accept projects without obtaining approval from a superior. Ennis. Aff. at ¶ 3. However, after Plaintiff was assigned to MIS, Ennis decided that Plaintiff needed to establish "accountibility" about his work assignments, and therefore required Plaintiff to compile a list of all reports that he was preparing.[6] Ennis.Aff. at ¶ 10 and Exhibit C.

Footnote six is presented at the next page.

Additionally, Ennis began to monitor Plaintiff's workload by no longer allowing Plaintiff to accept projects without first obtaining approval. Ennis.Aff. at ¶¶ 10 and 11 and Exhibit D. In no certain terms, Plaintiff was told that he was not to work on projects that were not approved by Ennis or his assistant Ronald Serao ("Serao"). [7] Ennis.Aff. at ¶ 10; Complaint at 33. Additionally , Ennis required Plaintiff to request approval from the administration prior to logging in overtime hours. Complaint at ¶ 26. Approval was not always granted; for example, Plaintiff's request in November, 1999, to work overtime during the "Y2k"emergency, was denied. Complaint at¶ 26. Furthermore, in May 2002, Plaintiff's request to work overtime during the "JCAHO" project, which was a time sensitive undertaking that required a large staff to complete, was denied. Complaint at ¶ 35; Plaintiff. Depo. At 307 and 309; Ennis.Aff. at ¶ 5.

On April 30, 2002, Ennis informed Plaintiff that all of the reports that he had been preparing using the Sai-

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[6] Ennis's decision was based on his belief that Plaintiff took on too many assignments at one time. Ennis.Aff. at ¶ 3

[7] In 2001, Ennis delegated the responsibility of approving requests for work to Serao, due to increased workload in MIS. Ennis. Aff. at ¶ 12.

nt System would no longer be needed when the hospital converted to using the Meditech System full time, and that plaintiff's services would therefore no longer be needed. Complaint at ¶ 34; Plaintiff.Depo. at 317; Ennis. Aff. at ¶ 8. Ennis also decided that Plaintiff, who was not a computer data entry person like most MIS employees would not be trained to use the Meditech System. Ennis.Aff. at¶ 6.Thereafter, on September 5, 2002, Plaintiff was transferred from his position at MIS to the Human Resources Department. Complaint at ¶ 18. Prior to Plaintiff's transfer, two other MIS employees, Ms. Roldan and Mr. Fishlinger, both who were white, were also transferred to other departments at Helen Hayes. Rosenzweig.Aff. Exhibit G (hereinafter "Plaintiff.Depo.") at 314. Ennis.Aff. at ¶ 6. Ennis and Czachorowski determined that the transfers were appropriate because Helen Hayes was converting its software system from the Saint System to the Meditech software system in the fall of 2002. Ennis. Aff. at ¶ 7; Plaintiff.Aff. at Exhibit 40.

In early September 2002, Helen Hayes requested permission to participate in the targeted Early Retirement Incentive Program ("ERI"), which had been enacted by the New York State legislature for Fiscal Year 2002-2003. Czachorowski.Aff. at ¶ 21 and

Exhibit C. Plaintiff first learned of the existence of ERI in June 2002, by reading about the program in the newspaper. Plaintiff Depo. at 51. On November 19, 2002, Czachorowski distributed a memorandum about ERI to Helen Hayes employees, including Plaintiff. Czachorowski.Aff. at ¶ 22 and Exhibit D. The memorandum set forth the eligibility criteria and requested that the employees who were interested in participating in the program should fill out the required notice of intent and return it to the Human resources Department by November 29, 2002. Id. The next day, November 20, 2002, Plaintiff returned a sign notice of intent form, which stated that he was interested in participating inERI and that he understood that completing and signing the form did not bind him to participate in the program. Czachorowski.Aff. at ¶23 and Exhibit E; Plaintiff.Depo. at 138.

On January 28, 2003, Czachorwoski submitted Helen Haye's final list of employees who wished to partcipate in the ERI, including Plaintiff. Czachorowski.Aff . at ¶ 24 and Exhibit F. Plaintiff knew that at the time he expressed interest in ERI that the State was in a "fiscal crisis," and that it was necessary to lay off a number of State employees. Plaintiff.Depo. at 141. Plaintiff also knew that after he retired his position at Helen Hayes would be eliminated. Plaintiff.Depo. at 141. Moreover, Plaintiff understood that it was possible that he would be laid off in 2003 or 2004. If he did not participate in the ERI, Plaintiff.Depo. at 49; Czachorowski.Aff. at ¶¶ 22 and 26.

One of the purposes of the ERI was to avoid potential layoff by creating an incentive for eligible employees to retire early by increasing the participant's pension benefits by one month for every year of service. Czachorowski.Aff. at ¶ 27. Using this incentive, Plaintiff's pension benefits were increased by twenty-seven months, early him nearly 30 years of benefits in Tier 1 of the New York Pension System. Czachorowski.Aff. at ¶ 27; Plaintiff.Depo. at 50. In addition to this incentive, Plaintiff also requested approval to continue working at Helen Hayes six days per month as a "per-diem" emplee. Czchorowski.Aff. at ¶ 28. However, after Czachorowski discussed Plaintiff's request with Ms. Ramirez, the director of Helen Hayes, it was decided that Plaintiff would not be offered per diem employment. Czachorowski.Aff.at ¶ 28; Plaintiff.Depo. At 145-146. Czachorowksi advised Plaintiff of the decision, and informed him that he still had time to withdraw his application. Czachorowski.Aff. at ¶ 28; Plaintiff.Depo. At 145-146. Thereafter, on February 26, 2003, Plaintiff wrote a memorandum to Ms. Ramirez documenting his discussion with Czachorowski with respect to the possibility of per diem employment. Plaintiff.Dep. at 147. Although Plaintiff never received a response from Ms.Ramirez, he did not take any action to withdraw his application to participate in ERI. Plaintiff.Dep. at 148. Plaintiff decided to "[g]o through with the retirement," which became effective on March 28, 2003. Plaintiff Dep. at 147.

B. Procedural History

1. *The Administrative Complaints*

On October 3, 2002, Plaintiff filed an administrative complaint with the New York State Division of Human Rights ("DHR") against DOH, DCS and the New York State Department of Audit and Control. See Rosenzweig.Aff. at Exhibit C (herein after "First DHR Complaint"). The Equal Employment Opportunity Commission ("EEOC") also accepted this filing, subject to the statutory limitations contained in Title VII, pursuant to a Worksharing Agreement between DHR and the EEOC. See First DHR Complaint at p. 3; see also Stering v. Contec Corp., 333 F. Supp. 2d 37, 38 (N.D.N.Y. 2004). Plaintiff claimed that he was discriminated because of his race and national origin, and was retaliated against, in violation of Title VII. Specifically, Plaintiff claimed that: (1) he was denied a promotion to Grade 27 even though he had not been promoted for seventeen years (First DHR Complaint at ¶ 4); (2) he was unfairly transferred to the Human Resources Department from MIS on September 5, 2002(id. at ¶ ¶ 2 and 7); (3) he was denied training on the New computer system used by DOH (id. at ¶ ¶ 3 and 5); (4) he was denied the opportunity to apply for the Computer Clinical Coordinator position in MIS, and the director of MIS, positions for which Plaintiff would have applied and for which Plaintiff believed he was qualified (Id. at ¶ ¶ 6 and 8). In further support of his allegations, Plaintiff claimed that there were no minorities in management positions at Helen Hayes, and that neither the Computer Clinical position, nor the Director position, were advertised. Id. at ¶ ¶ 6 and 8. Plaintiff alleged that the "most recent or continuing discrimination took place on 09/05/02." Id. at p.1.

On October 24, 2002, Plaintiff filed a second complaint with the DHR, which was also filed with the EEOC. Rosenzweig.Aff. At Exhibit D (hereinafter "Second DHR complaint"). Plaintiff's claims in the Second DHR Complaint were against Helen Hayes, and were identical to his claims in the First DHR Complaint, except that Plaintiff alleged two additional claims: (1) that no employee of Indian National origin was sent to Boston for training on the "New computer system" (Second DHR Complaint at¶ 5); and (2) that Plaintiff was being retaliated for filing EEOC complaint on August 8, 2000. Id. at ¶ 9: see infra at note 12.

On July 11, 2005, DHS issued a separate Determiation and Order After Investigation for each Plaintiff's DHR Complaints outlined above, finding that there was no probable cause to support Plaintiff's claims and dismissing both administrative complaints in their entirety.[8] See Rosenzweig.Aff. at Exhibits E and F.

2. *The Federal Complaint*

Plaintiff initiated the instant action on November 5, 2003, by filing a complaint with the Pro Se Clerk's

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[8] As will be discussed in the next section, Plaintiff filed the instant action on November 5, 2003, nearly two years before the EEOC completed its investigation and issued a right-to-sue letter to Plaintiff. The Court has not been provided with a right sue letter with respect to the instant case. The failure to obtain a right-to-sue letter is not a jurisdictional bar to bringing a Title VII lawsuit, but only a precondition that is subject to waiver. Francis v. City of New York, 235 F. 3d 763, 767 (2d cir. 2000). In the

Office (hereinafter the "original Complaint"). See Docket entry 1. On September 14, 2003, the Honorable Michel B Mukasey issued a Decision and Order granting Pl - aintiff sixty days to file an amended complaint "to detail his claim under Title VII and to show cause why this complaint should not be time-barred." Docket Entry 2, Decision and Order at 3. On October 6, 2004, Plaintiff filed an Amended Complaint (the "First Amended Complaint"), and at that time the case was assigned to Your Honor. Docket entry 4. On January 3, 2005, your Honor granted Plaintiff's application for permission to file a Second Amended Complaint, and Plaintiff timely filed the Complaint on January 10, 2005. Docket entry 8. The Defendants filed their Answer on April 11, 2005. Docket entry 13.

On January 12, 2006, the Defendants filed the instant Motion for Summary Judgment dismissing Plaintiff's Complaint in its entirety. Plaintiff filed his oppo-

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present case, the Defendants did not raise Plaintiff's failure to provide a right-to -sue letter in their Answer. Moreover, the Defendants have not raised this specific issue in their Motion for Summary Judgment. See Defendants' Memorandum. Accordingly, I conclude, and I respectfully recommend that Your Honor should conclude, that the Defendants waived and defense they may have had for Plaintiff's failure to provide a right-to- sue letter before initiating the present action in Federal Court.

sition to the Defendants' Motion on February 23, 2006, and the Defendants replied on March 6, 2006. Addititionally, Plaintiff submitted a "Sur-Reply" for the Court's consideration on March 14, 2006 (docket entry 24), and and the Defendants filed a timely response on March 24, 2006. Docket entry 25.

C. Plaintiff's Claims

In the Complaint, Plaintiff alleges three separate causes of action pursuant to Title VII, the Civil Rights Acts of 1866, 1871, and 1991,[9] and § 40-c of the New York State Civil Rights Law.[10] Plaintiff's First Cause of Action (see Complaint ¶¶13-18)) alleges that he was unfairly denied a promotion from Grade 22 to Grade 27 (hereinafter referred to as the "grade promotion "), and that the Defendants have an "unwritten policy to get rid of minority managers." Complaint at ¶ 14. Specifically Plaintiff claims that (1) on August 29, 2000 (see supra at page 4), the Defendants misled Plaintiff by telling him to file his application for a grade promotion with DCS instead of submitting his request with his superiors at Helen Hayes: (2) on or about July 24, 2001, the Defendants abolished the position of administrator Robert Close, who was white; (3) at a public hearing held on December 17, 2001, the Defendants submitted the findings of the Ad Hoc Committee (see supra at page 5), which Plaintiff claims unfairly influenced the Commission to deny his appeal; (4) from January 3, 2002, through April 1, 2002, the Defendants denied minorities the opportunity to compete for available positions, as evidenced by the Defendants hiring Ennis to be the Chief Information Officer of MIS without advertising the position; (5) On April 1, 2003 Plaintiff was denied the opportunity to apply for the Computer Clinical Coordinator position in MIS, which was filled by Damon before the position was advertised; and (6) on September 5, 2002, Plaintiff was not given supervisory responsibilities when he was transferred from MIS to the Human Resources Department.

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[9] Although Plaintiff did not cite to the appropriate statutory designations of the Civil Rights Law, he is clearly referring to 42 U.S.C. §1981.

[10] As stated supra at note 1, Plaintiff voluntarily withdrew his fourth cause of action aleging breach of contract on October 12, 2005.

In the Second Cause of Action (see Complaint at ¶ ¶ 19-21). Plaintiff alleges that the Defendants engaged in retaliation against him by : (1) informing him at a meeting held on August 29, 2000 (supra pages 3-4), that he must file an application for a grade promotion with DCS , not Helen Hayes; (2) effectively forcing

[here 15a]

Plaintiff to withdraw a separate lawsuit that Plaintiff filed in this Court in 2000 (the "2000 Complaint"), [11] by threatening to provide an unfavorable recommendation to DCS regarding Plaintiff's Application; [12] and (3) coercing Plaintiff to participate in the ERI program in 2003, or face being targeted for a lay off the next year.

In the Third Cause of Action, Plaintiff sets forth seventeen separate claims to show that he subjected to a hostile working environment. See Complaint ¶¶ 22-38. Specifically, Plaintiff alleges that he was subjected to a hostile working environment because: (1) from November 1997, through February 1998, a co-worker working at a lower grade than Plaintiff asked him to make coffee for Ennis, his Supervisor; (2) from December, 1998, to February, 1999, Plaintiff's request to have computer hooked up to "PAYSR" system, as well as requests for training in PAYSR, were denied; (3) from March, 1998 through June 1998, Plaintiff's requests for training in the Express Writer System were denied; (4) In April, 1999, Ennis "humiliated" Plaintiff by allowing employees assigned to lower grade levels to select offices in the in the new MIS building before Plaintiff had the oppotunity to do so; (5) on or about August 18 or 19, 1999, Ennis informed Plaintiff that he could not log in overtime hours without first obtaining approval from a supervisor; (6) on November 26, 1999, Plaintiff's request to be paid overtime wages for hours during the Y2K emergency was denied; (7) on or about January 10-13, 2000, Czchorowski advised Plaintiff to submit a request to Ennis for "financial support from the industry" for Plaintiff's "Contribution" (Complaint at ¶ 28); [13]

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[11] The 2000 Complaint was based on discriminatory conduct that allegedly occurred from November 14, 1997 through January 11, 2000. Complaint at ¶ 20. Plaintiff alleged that he had exhausted his claims in the 2000 Complaint by filing charges with the EEOC on August 2000, and that he received a Right-to- Sue letter from the EEOC on October 17, 2000. See Docket Entry 2, Decision and Order at 2, n.3.

[12] Plaintiff's second claim of retaliation, and tenth claim in his hostile environment cause of action (see infra at 14), alleged that Plaintiff later withdrew the 2000 Complaint due to threats Czchorowski made to Plaintiff on March 12, 2001. Plaintiff claims that on that day, he showed the 2000 Complaint to Czachorowksi, who proceeded to tell Plaintiff that Ms. Ramirez would not provide a favorable recommendation for him if he went forward with the 2000 Complaint. Id. Plaintiff claims that he withdrew the 2000 Complaint on March 15, 2001, based on Czachorowski's alleged threats, and the 2002 Complaint was therefore dismissed without prejudiced on July 9, 2001. See Docket Entry 2, Decision and Order at 2-3; see Shah v. Helen Hayes Hospital, No 00 Civ. 8873 (S.D.N.Y 2000).

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[13] It is unclear how Plaintiff claims this incident contributes to a hostile working environment because Plaintiff claims that after

(8) in December,2000, several employees returned Plaintiff's Christmas cards before the Christmas holidays; (9) on January 10, 2001, Plaintiff was denied training in the Visual Basic program; (10) on March 12, 2001, Czachorowski told Plaintiff that if he served the 2000 Complaint, that he would not receive a favorable recommendation for a grade promotion (see supra at note 12); (11) on September 12, 2001, Ennis told that he "didn't like black people"; (12) on January 24, 2002, Serao allegedly told Plaintiff in a threatening manner that he must obtain approval before accepting projects from other Helen Hayes staff;(13) on April 30, 2002, Ennis and Serao told Plaintiff that his services would no longer be required when Helen Hayes fully converted to using the Medite-

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discussing the matter with Czachorowski, he asked Ennis for financial support. Complaint at ¶ 28. However, Plaintiff claims that he was "humiliated" that Ennis interpreted his request to be for a financial reward in exchange for the work he had been doing at Helen Hayes. Id . It appears from Plaintiff's deposition testimony that Ennis may have understood Plaintiff to be refusing to disclose further software errors unless Ennis arranged for additional payments to be made to Plaintiff. See Plaintiff.Depo. At 273. Plaintiff denied that he had any intent to make such a threat, and that any belief to the contrary was a "misunderstanding." Id. In any event, regardless of how one interprets the basis for Plaintiff's claim, it is not race-related and therefore does not impact my analysis of Plaintiff's hostile environment claims in the Third Cause of Action.

ch System; (14) on May 2, 2002, Ennis denied Plaintiff's request to work overtime during the JCAHO inspection; (15) Plaintiff's requests to be trained to use the Meditech system were denied from September 2001, through September 13, 2002; (16) on or about September 6 or 7, 2002, Plaintiff had a nervous breakdown and fainted because his computer was temporarily disconnected to e-mail or the Saint system during his transfer from MIS to HR; and (17) Between January 26, 2003, and February 28, 2003, Czachorowski told Plaintiff that if he declined to participate in the ERI program, that Plaintiff would be laid off the next year.

In his Memorandum in opposition to the Defenadants' Motion for Summary Judgment ("Plaintiff's Opposition") , Plaintiff states for the first time that he is bringing a claim against the Defendants under the "Revenue Sharing Act." Plaintiff's opposition at 3. Even under the liberal pleading standards afforded to pro se litigants, Plaintiff's Complaint cannot be construed to contain a claim under the Revenue Sharing Act, which Plaintiff failed to properly identify by its common title or statutory designation. In the event , plaintiff has failed to allege that he properly exhausted his administrattive remedies as required by the statute. See 31 U.S.C. ¶ 6716(b). Thus, I conclude, and I respectfully recommend that Your should conclude, that Plaintiff cannot proceed with a claim under the Revenue Sharing Act because he failed to plead it in his Complaint. Moreover, I respectfully recommend that to the extent that Plainiff's Opposition can be construed as a request for permission to amend the Complaint a third time to include a claim under the Revnue Sharing Act, Your Honor should deny such an application because Plaintiff could not maintain an action under this statute because he failed to comply with its exhaustion requirement. See Kropelnicki v. Siegel, 290 F. 3d 118, 130-131 (2d Cir. 2002) (leave to amend should be freely given unless there is a good reason for denial, such as futility, bad faith, or undue delay).

II. DISCUSSION

A. The standard for Dismissal Pursuant to Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure ("Rule 56 ")

Under the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R.Civ. P. 56(c) Celotex Corp. v. Catrett.477 U.S. 317, 320-23 (1986). "Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no issue genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion." Local Civ. R. 56.1(a). A dispute of material fact is "genuine" if the evidence is such that a reasonable jury could return the verdict for the nonmoving party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). A trial judge may, therefore, grant summary judgment only if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. See Anderson. 477 U.S. at 250. The inquiry performed is the threshold inquiry of determining whether there are any genuine factual issues that properly can be resolved only by a finder of fact. Id.

Where a properly supported motion for summary judgment is made, the adverse party "must set forth specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56. Under Local Rule 56.1(b), the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short, and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried. Local Civ. R. 56.1(b). Summary Judgment may be granted only "[i]f after discovery, the nonmoving party 'has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof.' " Berger v.United States. 87 F. 3d 60, 65 (2d Cir. 1996) (quoting Celotex 477 U.S. at 323) (alteration in original). "The nonmoving party must have 'had the opportunity to discover information that is essential to his [or her] opposition' to the motion for summary judgment." Trebor SportwearCo. v. The Limited Stores Inc., 865 F. 2d 506, 511 (2d Cir. 1989) (quoting Anderson, 477 U.S. at 250 n. 5). Moreover, a court should "constru[e] the evidence in the light most favorable to the nonmoving part and draw [] all reasonable inferences in its favor. Mount Vernon Fire Ins. Co. v. Belize NY Inc. 277 F. 3d 232, 236(2d cir. 2002); Farias v. Instructional Sys. Inc., 259 F. 3d 91, 97 (2d Cir. 2001) ; Quinn v. Green Tree Credit Corp., 159 F. 3d 759, 764 (2d Cir. 1998); See also Anderson , 477 U.S. at 261 n.2. Additionally, pleadings filed by pro se plaintiffs are liberally construed and are generally held "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972); Boddie v. Schnieder, 105 F. 3d 857 , 860 (2d Cir. 1997). Thus "[o]nly when no reasonable trier of fact could find in favor of the nonmoving party should summary judgment be granted. Cruden v. Bank of New York, 957 F. 2d 961, 975 (2d Cir. 1992) (quoting H. L. Hayden Co. of New York. V. Siemans Med. Sys. Inc., 879 F.2d 1005, 1011 (2d cir. 1989).

B. Plaintiff's Civil Rights Claims under §1983,§ 1981, and the NYCRL

Plaintiffs claims that the Defendants subjected him to unequal treatment in violation of his Fourteenth Amendment rights. Plaintiff brings this claim pursuant to §§ 1983 and 1981, as well as § 40-c of the NYCRL. The Defendants argue that these claims must be dismissed as a matter of law. First the Defendants argue that Plaintiffs § 1983 claims should be dismissed for lack of subject matter jurisdiction, as the Eleventh Amendment bars private citizens from initiating lawsuits against a state. Second, the defendants further argue that Plaintiff's § 1981 is barred because the Supreme Court has held that § 1983 is the exclusive remedy for violation of § 1981 by state actors. Defendants' Reply at 3. Third, the Defendants contend that Plaintiff's state law claim must be dismissed because Plaintiff failed to comply with the notice provisions in § 40-d of NYCRL. See Defendants' reply at 3. I will discuss each of these arguments in turn.

1. Plaintiff's claims under §§ 1983 and 1981

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizen of another State, or by Citizens or subjects of any Foeign State. " U.S. CONST. Amend. XI. In addition, the Eleventh Amendment has been construed to proscribe an unconsenting state to be sued by one of its own citizens. CSX v. N.Y. State Office of Real Property Servvices, 306 F. 3d 87, 94 (2d Cir. 2002) (citing Edelman v.Jordan. 415 U.S. 651, 662-63; Hans v. Louisian 134 U.S. 1 (1890).

However, Eleventh Amendment immunity is not absolute and may be overcome in the following two ways. First a state may waive immunity and agree to be sued in federal court. CSX, 306 F.3d at 95. Waiver will only be found where a state expressly states its intention to consent to federal jurisdiction, or where there is an unequivocal indication of the State's intention to consent, such that there could be no other reasonable interpretation. Id.; Trotman v. Palisades Interstate Park Comm., 557 F. 3d 35, 39 (2d cir. 1977). Second Congress may override a state's sovereign immunity if it: (1) expressly and unequivocally states its intention to abrogate sovereign immunity; and (2) does so pursuant to a valid exercise of congressional power. CSX, 306 F. 3d at 95 (citation omitted); see also Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (recognizing that Eleventh Amendment and the principle of state sovereignty that it embodies is necessarily limited by the enforcement power of § 5 of the Fourteenth Amendment) .

There is no dispute that the Defendants are agencies of the State of New York. See Defendants' Memorandum at 15 (citing N. Y. Public Health Law §§ 200 403, copies of which are annexed to the Defendants Memorandum) ; see also Defendants' 56.1 Statement at ¶¶ 2 and 3; Plaintiff's 56.1 Statement at ¶¶ 2 and 3 . Additionally, Plaintiff has failed to establish that either of the above exceptions to Eleventh Amendment immunity apply to Plaintiff's claims. First Plaintiff has failed to meet the demanding burden that required to show that a state has consented to be sued in federal court. In the Complaint, Plaintiff failed to allege that the Defendants consented to be sued in this Court, much less claim that either Defendant expressly and unequivocally waived sovereign immunity. See CSX.

306 F. 3d at 95; Trotman, 557 F.2d at 39.

Second, in Quern, the Supreme Court explicitly held that Congress did not intend to abrogate a state's sovereign immunity under the Eleventh Amendment by enacting § 1983. Quern v. Jordan, 440 U.S. 332 (1979). In reaching this decision, the Supreme Court reasoned that there is no explicit language in § 1983 overriding the Eleventh Amendment, and the legislative history also does not directly focus on the issue of sovereign immunity. Id. In fact, the legislative history fails to show that Congress even considered this issue when enacting § 1983. Id. It is well settled that § 1981 did not override Eleventh Amendment immunity. See Yoonessi v. State Univ. of New York, 56 F. 3d 10, 12 (2d cir. 1995), cert. denied. 516 U.S. 1075 (1996) (affirming dismissal of § 1981 claim on Eleventh Amendment grounds); Hill v. Taconic developmental Disabilities Services Office, 181 F. Supp. 2d 303, 322 (S.D. N.Y. 2002) (overruled on other grounds)(citations omitted). Moreover, immunity extends to Plaintiff's claim under § 1981 because § 1983 provides exclusive remedy for pursuing federal damages on a § 1981 claim against a state actor. Jett v. Dallas Ind.School Dist., 491 U.S. 701, 735 (1989).

Plaintiff fails to state that an exception to Eleventh

Amendment immunity applies in this case. [14] Therefore, I conclude, and I respectfully recommend that Your Honor should conclude, that Plaintiff's claim under § § 1983 and 1981 against the Defendants should be dismissed for lack of subject matter jurisdiction, because as state entities are protected from suit by private citizens under the Eleventh Amendment.

3. Plaintff's State Law Claim under § 40-c of the NYCRL

Plaintiff's claims under § 40-c of the New York Civil Rights Law are similarly barred, as the Eleventh Amendment also protects states against suit in federal court for violations of state law. See Pennhust 465 U.S. at 122. Moreover, the Defendants correctly argue that a plaintiff must first notify the Attorney General of the State of New York either at or before commencing a law suit pursuant to that section. See N.Y. Civ. Rights Law § 40-d; Shephard v. Frontier Communications Service.

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[14] States are not only protected from suit by the Eleventh Amendment, but they also are not considered "persons" within the meaning of § 1983. See Will v. Michigan, 491 U.S. 58, 64 (1989). Thus a state or state agency cannot be sued under § 1983 even when the Eleventh Amendment does not apply. Id . (confronting for the first time whether states are considered "person" under § 1983 since the Eleventh Amendment does not apply in state court).

Inc., 92 F. Supp. 2d 279, 287 (S.D.N.Y. 2000). If this statutory requirement is not met, the claim must be dismissed. Shephard, 92 F. Supp. At 287 (citing Silver v. Equitable Life Assurance Soc'y, 563 N.Y.S. 2d 78, 80 (1st Dept. 1990). Here, Plaintiff has not alleged that he filed a timely notice with the New York State Attorney General. Thus, I conclude, and I respectfully recommend that Your Honor should conclude, that for the foregoing reasons, Plaintiff's claim under under § 40-c of the New York Civil Rights Law must be dismissed.

C. Plaintiff's Claims under Title VII

1. *The Filing Requirement*

Plaintiff was required to bring his claims before the DHR or the EEOC "within 300 days after the alleged unlawful employment practice occurred ...." See 42 U.S.C. § 2000-5(e)(1). Plaintiff filed the First DHR Complaint on October 3, 2002 and the Second DHR Complaint on October 24, 2002. See Supra at Section I. B.1. Therefore, Plaintiff may not complain of unlawful employment practices that occurred prior to December 7, 2001, and December 28, 2001, respectively. See Defendants' 56.1 Statement at ¶¶ 10 and 11; Plaintiff's 56.1 Statement at ¶¶ 10 and 11.

tions of discrimination extend beyond the 300-day period in which to file a charge of discrimination, the nature of the claim determines how much considerations will be given to the earlier conduct. See Petrosino v. Bell Atlantic, 385 F.3d 210, 220 (2d Cir. 2004). "Under the continuing violation exception to the Title VII limitation period, if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone." Patterson v. County of Oneida, 375 F.3d 206, 220 (2d Cir. 2004) (citations omitted) (internal quotation marks omitted). To bring a timely claim under the continuing violation theory, a plaintiff must allege that at least one act of discrimination that is in furtherance of the ongoing discrimination policy occurred within the applicable limitation period. Id. (Citations omitted). Thus, if at least one act contributing to the hostile environment claim occurred within the statutory filing period, then the entire time period in which the plaintiff alleges that the hostile environment was ongoing may be considered by the Court for the purpose of determining liability. Id. (Citations omitted).

In Plaintiff's Third Cause of Action alleging that he was subjected to a hostile working environment, Plaintiff fails to set forth allegedly race-based hostile actions occurring after December 8, 2001 [15] (see discussion at Section II.C.5). Thus, this Court may not properly consider Plaintiff's untimely hostile environment claims based on a continuing violation theory. See Petrosino , 385 F. 3d at 20. Based on the foregoing, I conclude, and I respectfully recommend that Your Honor should conclude, that Plaintiff's hostile environment claims set forth in ¶¶ 22-32 of the Complaint should be dismissed as untimely.

However, in the case of Plaintiff's failure to promote and retaliation claims, Title VII " 'precludes recovery for *discrete* acts of discrimination or retaliation that occur outside the statutory time period,' even if other acts of discrimination occurred within the statutory time period." Patterson, 375 F. 3d at 220 (citations omitted) (alteration in original). Thus, Plaintiff's failure to promote claim set forth in ¶¶ 13 and 14 of the Complaint are untimely, as the alleged discriminatory conduct occurred on August 29, 2000 and July 24, 2001 respectively. See supra at 11. Plaintiff's retaliation claims in the Second Cause of Action at ¶¶ 19 and 20 are also untimely as the alleged retaliatory conduct occurred on August 29, 2000 and March 12, 2001. See supra at 12. Moreover, Plaintiff concedes that these claims are untimely in the Complaint, as well as his deposition testimony. See Defendants' 56.1 Statement at ¶¶ 12-36; Plaintiff's 56.1 Statement at ¶¶ 12-26. Therefore, I conclude, and I respectfully recommend that Your Honor should conclude, that Plaintiff's claims in the Complaint at ¶¶ 13, 14, 19, 20 are untimely and should therefore be dismissed.

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[15] Moreover, Plaintiff hostile environment claims that are based on events that occurred prior to December 28, 2001, are also not race-related. See infra at SectionII.C.5.

Here
27a-28a

2. The Administrative Exhaustion Requirement

The "exhaustion requirement is an essential element in Title VII's statutory scheme." Butts v. City of New York 900 F.2d 1397, 1401 (2d Cir. 1993) (citation omitted). Anyone who brings claims of discrimination under Title VII must timely exhaust all available administrative remedies in an effort to resolve the matter informally before filing a formal complaint. Pauling v. Secretary of the Dept. of the Interior, 160 F.3d 133, 133-34 (2d Cir. 1998) (Title VII); Bruce v. U.S. Dept. of Jusitce, 314 F.3d 71, 74 (2d cir. 2002)(Rehab Act). Specifically, employees are required to initiate contact and consult with an EEO counselor within 45 days of an alleged discriminatory incident. Pauling, 150 F.3d at 134 (citing 29 C.F.R. § 1614.105(a)(1)). A plaintiff who has failed to report a claim of discrimination to an EEO counselor-and then failed to file a complaint with the Equal Employment Opportunity Commission ("EEOC") may not then file that claim in federal court unless the conduct complained of occurred subsequent to the filing of an EEO complaint and is "reasonably related" to the conduct alleged in that EEO complaint. Butts, 990 F.2d at 1401 (citation omitted).

A claim subsequent to those asserted at the administrative level is reasonably related if: (1) the conduct complained of would fall within the "scope of the EEOC investigation which can be reasonably be expected to grow out of the charge of discrimination . . . ' " (Butts, 990 F. 2d at 1402 (citation omitted)) ; (2) the new claim is one alleging retaliation against an employer (Id) ; and (3) what the plaintiff is alleging is "further incidents of discrimination carried out in precisely the same manner alleged in the EEOC charge." Id. (Citing Almendral v. New York State Office of Mental Health, 743 F.2d 963 (2d Cir. 1984)) . However, if a claim not originally asserted in the EEOC charge does not provide the opposing parties with fair notice of the claim at issue, then the court may not hear it. See Wilson v. Fairchild Republic

Co., Inc., 143 F. 3d 733 (2d cir. 1998).

Plaintiff alleges two claims in the Complaint that were not raised at the administrative level. First, Plaintiff's hostile environment claim that the Defendants failed to connect his computer to the network at Helen Hayes immediately (Complaint at ¶ 37) was not raised in either the First or Second DHR Complaint, and there is nothing in the record to show that Plaintiff brought this claim in any other required administrative filing. In addition, applying Butts test set forth above, Plaintiff's hostile environment claim is not reasonably related to his claims in the DHR complaints. First, Plaintiff's claim is based on an event that occurred prior to the filing of his First DHR Complaint. Second, his claim cannot be construed to be a claim of retaliation. Third, Plaintiff admitted in his deposition testimony that his computer was connected to network e-mail and the Saint System shortly after he transferred to the Human Resources Department. Plaintiff.Dep at 116. Because his complaint was addressed in a timely manner, I conclude that this alleged conduct would not fall within the scope of an EEOC investigation. Therefore, I conclude, and I respectfully recommend that Your Honor should concl- ude, that Plaintiff's hostile environment claim at (¶37) of the Complaint should be dismissed for Plaintiff's failure to comply with Title VII's exhaustion requirement.

Second, Plaintiff's allegation that Czachorowski coerced him into participating in the ERI program also was not raised in either of his DHR Complaints. Thus, any claims based on this event is not properly exhausted and cannot be considered unless it is reasonably related to the conduct alleged in Plaintiff's DHR Complaints. In the Complaint, the alleged conduct of Czachorowski forms the basis for a retaliation claim, as well as a hostile claim. To illustrate, Plaintiff claims that Czachorowski 's actions were in retaliation for Plaintiff filing the DHR Complaints (Complaint ¶ 21), and also contributed to a hostile working environment (Complaint at¶ 38). Using the Butts three-pronged analysis, I conclde, and I respectfully recommend that Your Honor should conclude, that to the extent that Czachorowski's conduct is pled as an act of retaliation, Plaintiff's claim can be properly considered with his exhausted claims. I further conclude, and respectfully recommend that Your Honor should conclude, that to the extent that Plaintiff's allegations is pled as a hostile environment claim, that Plaintiff fails to comply with the Butts standard, and that his hostile environment claim should be dismissed for failure to exhaust his administrative remedies.

3. Failure to Promote Claim

To establish a prima facie case of discriminatory failure to promote in violation of Title VII, a plaintiff must show that; "(1) she [or he] is a member of a protected class; (2) she [or he] applied and was qualified for a job for which the employer was seeking applicants; (3) she [or he] was rejected for the position; and (4) the position remained open and the employer continued to seek applicants having the plaintiff's qualifications." See Petrosino v. Bell Atlantic. 385 F. 3d. 210, 226 (2d cir. 2004) (citing Brown v. Coach Stores, Inc., 163 F.3d 706, 709 (2d cir. 1998) (internal quotation marks omitted). Plaintiff timely claims that his Application for a grade promotion was unfairly denied, and that he was denied the opportunity to apply for Computer Clinical Coordnator position and Chief Information Officer position. Supra at Section II.C.1. Plaintiff also timely claims that he was denied supervisory responsibilities when he was transferred to the Human Resources Department on September 5, 2002. Id: Complaint at ¶ 18. As an initial matter, Plaintiff satisfies the first prong of the prima facie case outlined above, as it is undisputed that Plaintiff is an

Asian male of Indian national origin. Supra at 2. Below I will address whether Plaintiff has satisfied the remaining three prongs with respect to his failure to promote claims.

Plaintiff's Aplication for a Grade Promotion

There is no dispute that Plaintiff filed an Application for a grade promotion, and that DCS denied his Application. The Commission upheld the denial of Plaitiff's Application on appeal. However, Plaintiff has failed to show that he was qualified for the grade promotion that he sought. In the Complaint, Plaintiff does not allege that he was qualified for the promotion of Research Scientist 4, Grade 27. Instead, the basis of Plaintiff's claim is that the members of the Ad Hoc Committee were not specialists in the field fo biostatistics, Plaintiff's specialty. Thus, Plaintiff contends that the Ad Hoc Committee could not determine whether Plaintiff met the qualifications for a grade promotion. Complaint at ¶ 15, Plaintiff further claims that the Defendants' submission of Ad Hoc Committee's findings at the December 17, 2001, hearing was an act of discrimination. Id.

Plaintiff does not dispute that the duties performed by an employee classified as Research Scientist 4, Grade 27, "typically serve as full members of a research team with major responsibilities for all phases of a research project. . . . They define problems; perform necessary research; develop appropriate plans to attack; execute research plans; organize and evaluate the results; and prepare acceptable reports of findings." Rosenzweig. Aff. at Exhibit H; Defendants' 56.1 Statement at ¶ 29 ; Plaintiff's Statement at ¶ 29. Although Plaintiff generally claims that he was entitled to the grade promotion, he offers no evidence to show that he regularly performed duties associated with an employee classified as a Research Scientist 4, Grade 27. Moreover, Plaintiff concedes that his duties at Helen Hayes were in the field of computers and statistics. See. e.g. Complaint at ¶ 11. Evidence has also been submitted to show that Plaintiff mostly worked independently on preparing reports on the Saint System, and performing research as part of a research team. See Ennis. Aff. at ¶ 10. In sum, there is nothing before the Court to show that Plaintiff was actually qualified for the grade promotion that he sought. Moreover, there has been no evidence presented to show that the Ad Hoc committee findings, or the decision of Helen Hayes to submit their findings at the Helen Hayes to submit their findings at the Dec- ember 17, 2001, hearing, were motivated by a discriminatory intent.[16]

Thus, I conclude, and I respectfully recommend that Your Honor should conclude, that as a matter of law, Plaintiff has failed to establish a prima facie case of discriminatory failure to promote based on the denial of his Application. Thus, I respectfully recommend that Plaintiff's failure promote claim on this ground should be dismissed.

The Positions of Computer Clinical Coordinator And Chief of Information Services at MIS

Plaintiff claims that the Defendants discriminated against him based on his race because he was not considered for the positions of Computer Clinical Coordinator ("CCC") and Chief Information Officer ("CIO"). The Defendants argue that these claims should be dismissed because Plaintiff failed to allege that he applied for either position, and that he was qualified for the positions, thus failing to satisfy the second element of the prima facie case outline above.

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[16] The Defendants argue that Plaintiff's failure to promote claim should be dismissed because DCS denied Plaintiff's Application; therefore, Plaintiff cannot demonstrate any discriminatory motive on behalf of the Defendants, Helen Hayes and DOH. However, Plaintiff's claim of discrimination is not based on the actual decision of DCS, but on the submission of the Ad Hoc Committee's findings at the December 17, 2001, hearing. Although the Defendants correctly argue that Plaintiff failed to establish a discriminatory motive on behalf of the Defendants, their argument that Plaintiff's discrimination claims are against DCS missed the mark.

In response, Plaintiff argues that: (1) he was not to comply with the application requirement of the second prong of the standard because positions were not posted; and (2) he was qualified for both positions and should therefore have been considered as a candidate. I will address each of Plaintiff's arguments below. Defendants' Opposition at 2, 5.

First, the Second Circuit has held that plaintiffs are not exempt from the application requirement if the positions are not posted, or even if the "aura" of discrimination discouraged the plaintiff from applying for a particular position. Brown v. Coach Stores, Inc. 163 F. 3d 706, 710 (2d cir. 1998). Rather, "to be excused from the specific application requirement, an employee must demonstrate that (1) the vacancy at issue was not posted; and (2) the employee either had (a) no knowledge of the vacancy before it was filled or (b) attempted to apply for it through informal procedures endorsed by the employer." Petrosino v. Bell Atlantic. 385 F. 3d 210, 227 (2d cir. 2004) (citing Brown, 163 F. 3d at 710, n.2).

Plaintiff complies with the first prong of the exception to the application requirement, as he claims that neither position was posted, and the Defendants do not set forth evidence to show that the positions were advertised. However, Plaintiff fails to allege that he was unaware that the positions were vacant before they were filled. He also does not claim that he attempted to apply for these positions through an informal process at Hel en Hayes. Thus, Plaintiff has not established that he is excused from the application requirement, and therefore fails to satisfy the second element required to demonstrate a prima facie discriminatory failure to promote claim.

Even if Plaintiff could establish that he is exempt from the application requirement, there is nothing in the complaint to show that Plaintiff was qualified for either positions. First, Plaintiff has failed to establish that he was qualified for the CIO position. The Defendants state that the skill require for the CIO position include, inter alia, "excellent communication skills, a working knowledge of Quality Improvement principles, methods and tools, at least seven to ten years of progressively responsible management experience in health-care organization and demonstratrated success in participatory and matrix management involving several level of management and staff." Czachorowski. Aff at ¶ 17. Plaintiff concedes that a major criteria for the position is supervisory experience. Complaint ¶16.2. However, the evidence shows Plaintiff's supervisory experience is limited to supervising one professional computer progammer and two or three key punch operators in 1983-84. See Plaintiff.Aff. at ¶ 2; Plaintiff Dep. at 112-113. Plaintiff failes to allege that he has additional supervisory experience, and fails to offer any credible evidence to show that he was qualified for the position of CIO. [17]

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[17] To illustrate, in the Complaint, Plaintiff supports his claim that was qualified for the CIO position by setting forth statistical data that has no relevance to the facts of the instant case. See. e.g. Complaint at ¶ 16.2. Additionally, Plaintiff claims that he was qualified because DOH Attorney Michael O'Brien "had conceded [sic] that plaintiff has the abilities to manage the MIS department []." See Plaintiff's Opposition at 3 (citing Plaintiff.Aff. at Exhibit 10, Letter from Michael O'Brien dated October 13, 2000, in response to an administrative complaint filed by Plaintiff ("O'Brien Letter") (underline in original), see also Complaint at page 13, n.3. However, the portion of the O'Brien letter that Plaintiff is referring to says nothing regarding Plaintiff's qualifications:

Second, Plaintiff cannot establish that he was qualified for the CCC position. The Defendants argue that Plaintiff failed to meet the qualifications, as the position required that "the candidate have some clinical and direct patient-care experience." Czachorowski. Aff at ¶ 14. Plaintiff conceded at his Deposition on August 16, 2005, that he did not know whether medical or clinical experience was required for the position, and further he does not posses skills or experience in that particular area. Plaintiff.Dep. at 114-115. Plaintiff contradicts his own deposition testimony in his Opposition, where he states that CCC position "has nothing to do [with] clinical experience or direct patient care." Plaintiff's Opposition

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> The decision to reorganize the information management services and to hire an outside contractor to manage it, in no way is meant to disparage the abilities of the complainant. The Complainant may feel that the choice to hire a contractor was made to keep the complainant from moving into the higher paying job as Director of the management Information Services Department. That however was not the intent of Helen Hayes Hospital.

O'Brien Letter at 2. Attorney O'Brien's letter certainly cannot be interpreted to state that Plaintiff was qualified to manage the MIS Department.

at 6.n.2. Plaintiff fails to submit evidence to support this contradictory statement. Moreover, qualifications notwithstanding, even if Plaintiff had applied for, and obtained the CCC position, the assignment was designated as a Grade 20, two grades below Plaintiff's designation. Czachorwoski.Aff. at ¶ 14.

Additionally, there is no evidence to support the conclusion that either Damon or Ennis were hired simply because they were white. On the contrary, there is ample evidence to establish that both Damon and Ennis were qualified for the respective positions. Damon was a nurse with significant patient-care and clinical experience, a fact Plaintiff does not dispute. Plaintiff.Depo. At 115. Ennis had been supervising MIS for ten years as a contract employee working for Superior when DOH decided to hire him as a permanent employee in 2002. Based on the foregoing, I respcectfully recommend that Your Honor should dismiss Plaintiff's claims because, as a matter of law, Plaintiff has failed to establish a prima facie case of discriminatory failure to promote.

However, in the event that Your Honor disagrees with my recommendations set forth above, I further recommend that Plaintiff's claims should be dismissed because Plaintiff cannot show, by a preponderance of the evidence, that the Defendants's reason for not considering Plaintiff for the CIO or CCC positions were pretextual. If the Plaintiff establishes a prima facie case of discrimination, "and the employer then comes forward with admissible evidence of a legitimate nondiscriminatory reason for its adverse employment decision, the plaintiff is given an opportunity to adduce admissible evidence that would be sufficient to permit a rational finder of fact to infer that the employer's proffered reasons is pretext for an impermissible motivation." See Howley v. Town Stratford, 217 F.3d 141, 150 (2d Cir. 2000) (citation omitted).

Here, the Defendants have submitted evidence to show that Plaintiff was not hired in the position of CIO or CCC because he did not apply for either position, and in any event, Plaintiff did not meet the qualifications for either position. Plaintiff claims that the Defenandants stated reason were pretextual, and that Helen Hayes developed the following qualifications for the CIO positions to ensure that Ennis would be assigned:"(1) a candidate must have a number of years of experience as a CIO; (2) he must be a Chief Information Officer [sic] ; and (3) He must have a supervisory experience in managing the MIS Department." Complaint at ¶ 16.2; Plaintiff's Opposition at 2 (citing the Second O'Brien Letter). Plaintiff also claims that the Defendants hired Damon in the CCC position a part of a plan to "get rid of Plaintiff." Complaint at ¶ 17. However, Plaintiff has failed to show that the Defendants' decision to hire Ennis and Damon was "more likely than not motivated, in whole or in part, by unlawful discrimination." Howley, 217 F. 3d at 150 (citation omitted). On the contrary, no evidence has been submitted to show that the Defendants intentionally discriminated against the Plaintiff. See Id. ("The ultimate burden of persuading the trier of fact that defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff.") (citation omitted) (internal quotation marks omitted).

Thus, I conclude, and I respectfully recommend that Your Honor should conclude, that Plaintiff has offered no evidence that the Defendants intentionally discriminated against him, and that his failure to promote claims should therefore be dismissed on this ground.

The September 5, 2002 Transfer

Plaintiff's final claim under the failure to promote cause of action is that he was transferred to the Human Resources Department on September 5, 2002, but was not promoted to a supervisory position. Complaint at ¶ 18. Plaintiff claims that white employees who were transferred were given supervisory responsibilities. Id. However, Plaintiff fails to allege that he applied for a specific supervisory position. In order to establish a prima facie case of discrimination, a plaintiff must show that "she [or he] applied for an available position for which she [or he] was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Brown v. Coach Stores Inc., 163 F.3d 706, 709 (2d cir. 1998) (citations omitted) (internal quotation marks omitted). This mandate requires that a Plaintiff apply for a specific position or positions, rather than making a general request for a promotion, because employers would be unfairly burdened in monitoring their promotion efforts Id. at 710. To illustrate, if generally requesting a promotion were sufficient to satisfy this requirement, then employers would be required to "keep track of all employees who have generally expres- sed an interest in promotion and consider each of them for any opening for which they are qualified but did not specifically apply." Id.

Here, Plaintiff vaguely claims that he was denied supervisory responsibilities when he was transferred, without supporting his claim with any evidence to show that he actually applied for a supervisory position in the Human Resources Department. Additionally, no evidence has been presented to support an inference that the Defendants' decision to transfer Plaintiff in September, 2002, was motivated by an intent to discriminate against the Plaintiff because of his race. Therefore, I conclude , and I respectfully recommend that Your Honor should conclude, that as a matter of law, Plaintiff-'s claim arising out of his transfer on September 5, 2002 should be dismissed.

4. Retaliation Claim

It is unlawful under Title VII § 704 for an employer to discriminate against an employee who "has opposed any practice made an unlawful employment practice by this subchapter, or because he[or she] has made a charge . . . or participated in any manner in an investigation, proceeding, or hearing under this subchapter." U.S. v. New Transit Authority, 97 F.3d 672, 677 (2d cir. 1996) (quoting 42 U.S.C. § 2003-3(a)). To establish a prima facie case of retaliation, a plaintiff must show: " [1] participation in protected activity known to the defendant, [2] an employment action disadvantaging the person engaged in protected activity, and [3] a causal connection between the protected activity and the adverse employment action." Johnson v. Palma 931 F. 2d 203, 207 (2d cir. 1991). An employee's filing of discrimination charge with an external agency is a protected activity. See NY Transit Authority, 97 F.3d at 677. In the present case, it is undisputed that Plaintiff filed a discrimination charge with the EEOC and that the Defendants knew that he was in communication with the EEOC regarding these charges. The first prong is therefore satisfied, and the second prong- whether Plaintiff suffered an adverse and employment action- is at issue for this Court.

In deciding whether a plaintiff's claim meets this second prong, it is important to note that Title VII only prohibits discrimination, not every employment action that is adverse to the employee. NY Transit Authority, 97 F.3d at 677. A plaintiff suffers an adverse employment action if he or she experiences a " 'materially adverse change' in terms and conditions of employment." Galabya v. New York city Board of Education, 202 F.3d 636, 640 (2d Cir. 2000) (citing Richardson, 180 F. 3d at 426, 446). A change in working conditions must be " 'more disruptive than a mere inconvenience or an alteration of job responsibilities' " to be considered " 'materially adverse.' " Galabya 202 F.3d at 640 (citations omitted).

Under Title VII, an adverse employment action is not solely defined in terms of job termination, demotion, or loss of benefits. Wannamaker v. Columbian Rope Co., 108 F.3d 462, 466 (2d Cir. 1977). Although less serious reprisals will be considered adverse for purposes of stating a retaliation claim, " ' not every unpleasant matter sort of [discharge or demotion] creates a cause of action for retaliatory discharge.' " Id. (Citations omitted) (alteration in original). The following are possible indications that a materially adverse change in employment has occurred: " ' . . . a termination of employment, a demotion evidences by a decrease in wage or salaary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation.' " Galabya, 202 F. 3d at 640 (citations omitted). Because there is no definitive test to determine whether an action constitutes an adverse employment action, courts may analyze the facts and circumstances in each individual case. See Wannamaker, 108 F.3d at 466.

To support his retaliation claim, Plaintiff claims that Czachorowski effectively coerced him into particippating in the ERI program by telling Plaintiff that he woould risk a possible lay off the following year by not participating. Plaintiff testified in his deposition that no other threats were made to him concerning his particpation in the ERI program. Plaintiff.Dep at 152. Thus, to decide whether Plaintiff's retaliation claim is sufficient to survive summary judgment, the Court must determine whether, under the circumstances presented in this case, a reasonable person would have concluded that Plaintiff had no choice but to participate in ERI. See Auerbach v. Board of Education of the Harborfields Central School Dist., 136 F. 3d 104, 113 (2d Cir. 1998) (early retirement plan did not violate the Age Discrimination in Employment Act ("ADEA") because the plan was voluntary and Plaintiff was given sufficient time in which to make an informed decision) (citing Paolilo v. Dresser Induc., Inc., 821 F. 2d 31, 84 (2d cir. 1987). For the reasons set forth below, I conclude, and I respectfully recommend that Your Honor should conclde, as a matter of law, the ERI was a voluntary program in which Plaintiff knowingly and deliberately particpated after having reasonable period of time to consider his options and to make an informed choice.

First, the ERI was a voluntary state-wide program and Ms. Ramirez formally requested that Helen Hayes be included in this program by sending an interoffice memo to Robert Reed, the Director of Bureau of Budget Management. See Czachorowski. Aff. at ¶ 21 (referencing Ms. Ramirez's interoffice memo, annexed as Exhbit C). Ms. Ramirez sent the above-referenced memo on September 3, 2002, over one month prior to Plaintiff filing his DHR complaints. Thus, at the very least, it is clear that Helen Hayes did not enroll in the ERI program for the purpose of retaliating against Plaintiff.

For the following reasons, the evidence also establishes that Plaintiff voluntarily chose to participate in the ERI program. Plaintiff learned of the possibility of participating in ERI on November 19, 2002, in a memo that was distributed to New York state employees working at Helen Hayes. Czachorowski. Aff. at ¶ 22; Plaintiff. Depo at 133. The next day, Plaintiff returned a signed notice of intent stating that he was interested in participcopating in ERI. Czachorwoski.Aff. at ¶ 23; Plaintiff.Depo. at 138. On January 28, 2003, Czachorowski submitted Helen Hayes' final list of employees who wished to participate in the ERI, which included Plaintiff, as well as fifteen other New York state employees who worked at Helen Hayes. Supra at 8. Of the sixteen employees, fifteen, including Plaintiff, held positions that were slated to be abolished after their retirement. Czachorowski.Aff. at ¶ 24. Additionally, Plaintiff testified that he understood that although he was targeted to participate in ERI, that he could not be forced to do so. Plaintiff.-Depo. at 140. He also testified that he understood that his postion could not be included with the positions stated to be abolished pursuant to the ERI if he decided not to retire early. Plaintiff.Dep. at 140. Morover, Plaintiff never attempted to withdraw his application to participate in ERI, and admitted in his deposition testimony that he never even had any thoughts of revoking his decision to be included as a participant in the ERI program. Plaintiff.Depo. At 152. Thus, I conclude, and I respectfully recommend that Your Honor should conclude, that the ERI program at Helen Hayes was a voluntary program, in which Plaintiff knowingly and freely chose to participate.

Second, Plaintiff had a reasonable period of time in which to make an informed decision. He learned of the statewide in the fall of 2002, and was provided with formal notice that Helen Hayes was participating in November, 2002. Plaintiff made the final decision to partcipate in the ERI in March, 2003, after several months of receiving correspondence from the Human Resources Department, and after having conversations with Czachorowski about participating in ERI. Czachorowski.Aff. at ¶¶ 21-30. Thus, I conclude, and I respectfully recommend that Your Honor should conclude, that Plaintiff had a reasonable amount of time in which to make decision. Auerbach, 136 F.3d at 113 (finding four months is a sufficient amount of time for employees to weigh their option with regard to participating in an early retirement plan).

There has been no evidence presented to show that the Defendants' targeting Plaintiff to participate in the ERI program was motivated by a desire to discriminate against Plaintiff based on his race. Indeed, by participating in ERI, Plaintiff's pension benefits were increased by twenty- seven months, earning him a total of nearly thirty years of benefits in Tier 1 of the New York State Pension System. Supra at 8. In sum, Plaintiff's allegations do not state a claim of retaliation. Therefore, I conclude, and I respectfully recommend that Your Honor should conclude, that Plaintiff has failed to state a claim of retaliation and that his claim should be dismissed.

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5. ***Hostile Environment Claim***

In order to successfully claim he or she was subjected to a hostile work environment in violation of Title VII, a plaintiff must show that the "workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) (reaffirming the standard outlined in Meritor Saving Bank v. Vinson, 477 U.S. 57, 106 (1986)). This standard contains both an objective and subjective prong. Id. at 21-22. In order to find that a working environment is sufficiently hostile, the court must find that: (1) a reasonable person would find that the workplace environment is hostile or abusive; and (2) the complainant must also subjectively find that the workplace environment is abusive. Id.

In the present case, whether Plaintiff subjectively felt he was subjected to a hostile and abusive work environment is not an issue. Plaintiff, in the Third Cause of Action of his Complaint, set forth numerous alleged incidents that he claims contributed to a "hostile" or "abusive"working environment. See Complaint at p. 22. Thus the only issue before this court is whether Plaintiff's work environment was objectively hostile.

Whether an environment is objectively hostile or abusive can only be determined by looking at the all of the circumstances, which may include "(1) the frequency of the discriminatory conduct; (2) its severity; (3) whether the conduct was physically threatening or humiliating, or a 'mere offensive utterance' ; (4) whether the conduct unreasonably interfered with plaintiff's work; and (5) what psychological harm, if any, resulted." Richardson v. New York State Dept. of Correctional service. 180 F.3d 426, 437 (2d cir. 1999) (citing Harris, 510 U.S. at 23; Quinn v. Green Tree Credit Corp., 159 F. 3d 759, 767-68 (2d Cir. 1998).

The Supreme Court has held that Title VII is more than a "general civility code," and only prohibits conduct that constitutes discrimination, not conduct that is simply offensive to an individual. See Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 80 (1998). Therefore, isolated incidents of discriminatory remarks or jokes will not support a hostile environment claim unless the discriminatory conduct is so severe that it actually alters the conditions of the plaintiff's employment and clearly creates an abusive environment in which the plaintiff must work. Richardson. 180 F.3d at 437. Occasional "teasing, offhand comments, and isolated incidents" are not, alone, sufficient to state a claim of hostile work environment, even if the remarks have racial or sexual undertones. See Clark County Sch. Dist. V. Breeden, 532 U.S. 268, 271-72 (2001). In addition, being openly criticized for one's work, if the criticism is not race or gender related, is not sufficient to establish a Title VII cause of action. Weeks v. New York State Div. Of Parole, 273 F.3d 76, 86 (2d Cir. 2001).

In the present case, Plaintiff fails to establish that his environment was objectively hostile. Applying the standard set forth above, there has been no evidence submitted to show that his workplace was so permeated with discriminatory behavior that it changed his terms and conditions of employment for the worse. In his timely claims, which are mainly comprised of supposed disputes with his supervisors, Plaintiff fails to allege that the combination of these incidents were so severe that they interfered, even minimally, with Plaintiff's ability to do his job. Even if the Court were to consider all of the Plaintiff's hostile environment claims, including that those were not timely filed with the DHR, I conclude that Plaintiff has not shown that any of these incidents were race-related. Plaintiff allegations of perceived disputes with co-workers and supervisors, which are not race related, and which had no demonstrable negative impact on Plaintiff, cannot as a matter of law establish a prima facie case of hostile work environment discrimination. See Faragher v. Boca Raton, 524 U.S. 775, 788 (1998) (offhand comments and isolated incidents, unless extremely serious, do not state a hostile work environment claim). Therefore, I conclude, and I respectfully recommend that Your Honor should conclude that Plaintiff has failed to state a hostile work environment claim, and that this claims should be dismissed.

III. Conclusion

For the reasons set forth above, I respectfully recommend that Defendant's Motion for Summary Judgment should be GRANTED in its entirety, and that Plaintiff's claims against the Defendants should be dismissed in their entirety.

IV. NOTICE

Pursuant to 28 U.S.C. 636(b)(1), as amended , and Fed. R. Civ. P. 72(b), the parties shall have ten (10) days, plus an additional three (3) days, pursunat to Fed. R. Civ. P. 6(e), or a total of thirteen (13) working days, see Fed. R. Civ. P. 6(a), from the date hereof, to file written objections to this Report and Recommendation.

Such objections, if any, shall be filed with the Clerk of the Court with extra copies delivered to the chambers of The Honorable Charles L. Brieant at the United States Courhosue, 300 Quarropas Street, White Plaints, New York, 10601, and to the chamber of the undersigned at the same address.

Failure to file timely objections to this Report and Recommendation will preclude later appellate review of any order of judgment that will be entered.

Requests for extension of time to file must made to Judge Brieant.

Dated: April 11, 2006
White Plains, New York

Respectfully Submitted ,

LISA MARGARET SMITH
UNITED STATES MAGISTRATE
JUDGE.

A copy of the foregoing Report and Recommendation has been sent to the following:

The Honorable Charles Brieant.

U. S. COURT OF APPEALS FOR THE SECOND
CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O;Hagan Wolfe
CLERK OF COURT

Date

DC Docket Number 04-cv-7342
DC: SDNY (WHITE PLAINS)
DC Judge Hon. Charles Brieant

Short Title: Shah v. Helen Hayes Hospital

At a stated Term of the United States Court of Appea- ls for the Second Circuit, held at the Daniel Patrick Mo-ynihan United States Courthouse, 500 Pearl Street, in the city of New York, on the 12th day of December two thousand seven.

Present:

Hon. Wilfred Feinberg,
Hon. Ralph K. Winter
Hon. Chester J Straub.
Circuit Judges.

Bhupendra K Shah,
Plaintiff-Apellant,

V.

Helen Hayes Hospital, NY Department of Health
Defendants-Apellees.

A petition for panel rehearing having been filed herein by Appellant Bhupendra K Shah,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

For the Court:
Catherine O'Hogan Wolfe, Clerk
Sd.by ____________________
Motion Staff Attorney